80-1002

No. .....

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Petitioners,

—against—

AMY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY in their own right,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The principle questions presented for review are:

1. Whether the standard of "free appropriate public education" adopted by the Court of Appeals, by its affirmance of the District Court decision, will cause chaos in the administration of the Education of All Handicapped Children Act of 1975, 20 U.S.C. 1401 et. seq.

2. Whether the Court of Appeals misconstrued the function of a state plan for "free appropriate public education", approved by the Federal Commissioner of Education under the Act, when it failed to order dismissal of a complaint to provide an interpreter for a deaf student, upon a demonstration by the local school district that it was in conformity with the state plan.

3. Whether, in light of the clear language of the Act, which mandates exam-

ination of unique individual needs before placement of handicapped pupils can be made, the Court of Appeals correctly affirmed the decision of the District Court which was based on the syllogism that: all deaf people need sign language interpreters, Petitioner is deaf, therefore Petitioner must have a sign language interpreter.

4. Whether the federal courts have jurisdiction to hear cases arising under the Act prior to completion of the administrative procedures contained in the Act.

5. Whether the Court of Appeals' attempt to limit the applicability of its decision to the facts of this case constituted error, in view of the national importance of the issue and the precedential weight its opinion has given to the District Court decision.

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PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding before the Court of Appeals and the District Court.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit, for which review is sought, and its order denying rehearing, are not yet reported. The opinion of the District Court (S.D.N.Y.) is reported at 483 F.Supp. 528, and the District Court's memorandum opinion and order are reported at 438 F.Supp. 536. These documents, as well as the decisions of the New York State Commissioner of Education and the Independent Hearing Officer are included in the Appendix to this Petition. .

JURISDICTION

The opinion of the Court of Appeals was filed on July 17, 1980. Petitioners' Petition for Rehearing, which was timely filed, was denied by the Court of Appeals on September 17, 1980. The judgment of the Court of Appeals was filed on October

1, 1980. This Court's jurisdiction is invoked under 28 U.S.C. Section 1234(1).

STATUTE INVOLVED

The statute in question in this case is the Education of All Handicapped Children Act of 1975, 20 U.S.C. 1401 et. Seq. Pertinent Sections of the statute, as well as pertinent sections of the Regulations promulgated under it, 45 C.F.R. 121a., are reproduced in the Appendix.

STATEMENT OF THE CASE

In September, 1978, the Hendrick Hudson Central School District placed Amy Rowley, a deaf first grade student who has significant residual hearing in lower frequencies and can distinguish vowel sounds, in a regular classroom setting with the supportive services of

a certified teacher of the deaf, a speech and language therapist and a discrete sound amplification device. A teletype machine was installed in the school's office to communicate with Amy's parents, Clifford and Nancy Rowley, who are also deaf.

A sign language interpreter was placed in Amy's kindergarten class for a trial period to determine the efficacy of the service. The School District administration, the classroom teachers, and the interpreter all concluded that the service was unessential and might ultimately prove to be harmful to Amy's academic and social development, which was outstanding.

Her parents appealed the determination to an Independent Hearing Officer, on the ground that every deaf student has a right to an interpreter upon

parental demand, regardless of how the child is achieving academically and socially. The Hearing Officer upheld the School District's determination on the ground that the placement and services were appropriate, and were resulting in academic and social success for Amy.

The Rowleys appealed to the New York State Commissioner of Education, who upheld the Hearing Officer's determination and found the School District's determination in compliance with the State's plan.

That determination was appealed to the U.S. District Court for the Southern District of New York pursuant to 20 U.S.C. 1415(e)(2). The Plaintiffs moved for a preliminary injunction; the District moved to dismiss the complaint on the ground that the District's determination was in conformity with the State plan and the Plaintiffs had not named the State Com-

missioner of Education as a Defendant. The District Court denied the School District's motion, but ordered the Commissioner of Education added as a Defendant. The Plaintiffs and the District (the Commissioner had not yet been formally joined as a party defendant) stipulated that the Court's judgment on Amy's 1978-79 placement would be binding on the parties for her 1979-80 placement. The Commissioner objected to the Court's jurisdiction on the ground that no determination for 1979-80 could be made without the Commissioner's prior review and determination for that year, which had not been made. The motion for the preliminary injunction became a trial on the merits, by stipulation. The District Court erroneously determined that there was no statutory definition of "free appropriate public education" and that it

was consequently free to formulate its own definition that each handicapped child be given an opportunity to achieve a full potential commensurate with the opportunity provided to other children.

The Court said that its standard required the School District to measure the potential of the handicapped child, compare that potential to his performance and compare the resulting shortfall to the shortfall experienced by non-handicapped children. It held that no evidence had been received to determine or compare a shortfall and it was thus free to order provision of an interpreter for Amy because "every deaf child hears better in class with an interpreter."

The Court said the Commissioner had no right to review the determination for the 1979-80 school year prior to the Court's review.

The majority of the panel of the Court of Appeals of the Second Circuit affirmed. Judge Mansfield dissented on the ground that the District Court mistakenly formulated its own definition of an appropriate education, then misapplied its standard to reach a wrong result, ignored the role of the State plan and the fact it did not provide for an interpreter, and denied the Defendants due process by admitting hearsay documents which could not be cross-examined.

The Court of Appeals denied Appellants' timely joint motion for a rehearing en banc.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals adopted an erroneous standard of "free appropriate public education" by affirming the District Court determination, which, if left to stand, will cause chaos in the administration of the Act.

Unaware of the Act's definition of a "free appropriate public education", the District Court formulated a new definition which is unnecessary, unworkable and a departure from Congressional intent. It has no basis in the statutory wording or the legislative history of the Act.

The Court held "appropriate education" to mean:

> that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children. (A-C 10) [1] 483 F.Supp. at 534.

1. Citations to "R-A", "R-T", and R-E" are to the Record (Appendix, Transcript, and Exhibits, respectively) submitted to the Court of Appeals, and certified and transmitted to this Court. Citations to "A-A", "A-B", etc. are to the Appendices to this Petition.

The District Court based its definition on a standard found in a regulation[2] promulgated under an entirely different statute, the Rehabilitation Act of 1973, 29 U.S.C. 701 et. seq. ("Rehabilitation Act"), which provides for non-discriminatory rehabilitative services for the handicapped in order to promote equality of employment.

The Court found license to construct its definition in its assumption that the intent of the Act was to allow the courts freedom to interpret the goal of free appropriate public education. It said:

> Aside from the HEW regulation quoted above, it has been left entirely to the courts and the hearing officers to give content to the requirement of an "appropriate education". (A-C-10) 483 F.Supp. 528, 533.

2. 45 C.F.R. 84.33(b): Appropriate education. (1) For the purpose of this subpart, the provision of an appropriate education is the provision of a regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as

The intent of the instant Act is manifestly different. While the Rehabilitation Act mandates rehabilitative services designed to maximize the potential for employment of handicapped persons, this Act requires provision of special education and related services in order to enable handicapped pupils to benefit from education. The Rehabilitation Act contains provisions for vocational services, which include sign language interpreters (29 U.S.C. 777e), a clear demonstration that when Congress wanted to provide for a sign language interpreter it knew how to do so. Nowhere in this Act or the

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adequately as the needs of non-handicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of Sections 84.34, 84.35 and 84.35. 45 C.F.R. 84.33(b).

Regulations promulgated under it is mention made of sign language interpreters. The omission is especially indicative of Congressional intent, in view of the long list of services provided to the deaf under the detailed definition of "Audiology" found at 45 C.F.R. 121a.13 (b)(1).

The District Court's determination that, under the Act the courts must give content to the requirement of an appropriate education, ignored the definitions of "free appropriate public education" (20 U.S.C. 1401(18), 45 C.F.R. 121a.4), "special education" (20 U.S.C. 1401(16), 45 C.F.R. 121a.14), and "related services" (20 U.S.C. 1401(17), 45 C.F.R. 121a.13) set forth in the Act and Regulations. These sections delineate the goals of "free appropriate public education".

Nevertheless, the District Court formulated a new definition which compels the local school districts to provide an

education which enables the handicapped child to achieve his full potential. (A-C 10) (483 F.Supp. 528, 534).

The Court went on to state that this standard requires:

> that the potential of the handicapped child be measured and compared to his or her performance, and that the resulting differential or "shortfall" be compared to the shortfall experienced by non-handicapped children. (A-C 13-14) 483 F.Supp. 528, 535.

The legislative history of the Act demonstrates that this was not the Congressional objective. Rather, the goal was that the educational program provided to handicapped children enable them to become independent and productive citizens, within the limits of their handicapping condition.

The Senate Report on the proposed legislation stated:

> With proper education services, many would be able to become productive citizens, contributing to society instead of being

> forced to remain burdens. Others, through such services would increase their independence, thus reducing their dependence on society.
> S.Rep. No. 94-168, 94th Cong., 1st Sess., reprinted in (1975) U.S. Code Cong. and Ad. News, 1425, 1433.

The Senate Floor debates on the proposed Act also demonstrate that the legislators' goal was enabling the handicapped to become independent, self-sufficient members of society. Senator Williams stated that:

> providing appropriate educational services now means that many of these individuals will be able to become a contributing part of our society, and they will not have to depend on subsistence payments from public funds.
> 121 Cong. Rec. 19492 (1975).

Senator Randolph concurred in this view and stated that passage of the bill would

> give these children the educational services they need to compete in today's changing world.
> 121 Cong. Rec. 37410 (1975).

In the debate in the House, Congressman Harkin said:

> With proper educational services provided now, at a young age, these children can become productive citizens, contributing to society instead of being left as burdens on our society.
> 121 Cong. Rec. 25541 (1975).

The legislative history of the Act shows that the definitions formulated by the District Court are at variance with the purpose of the Act. The Act was intended to enable the handicapped to become functioning members of society, insofar as their handicapping conditions allow. Its purpose was not to compel school districts to provide the handicapped with the opportunity to achieve maximum or full potential, however desirable that goal may be.

Not only were the District Court's formulations unnecessary in light of the statutory language, and inconsistent with

the legislative goals, they were also impossible of application. After delineating standards by which to measure provision of a "free appropriate public education", the Court found it impossible to apply them to the instant case, and therefore extrapolated from information purportedly applicable to all deaf students to the student in this case (see Point 3 infra).

The District Court's standard will be equally difficult to apply in other cases. While an attempt to evaluate the potential of a single child, based on the factors set forth by the Court, would prove to be an extremely difficult task;[3]

3. Attempting to evaluate an individual child's potential is an extremely difficult task, involving much speculation. "The response to almost any interesting question concerning the education of the handicapped is either that the answer is unknown or that no generalized beneficial effect of a given treatment can be demonstrated," Kirp,

an attempt to apply the same type of evaluative techniques to large groups of children would surely be an insurmountable one. Further, even if a method for such evaluation could be devised, parental objection to such exhaustive testing of all children would likely arise. Assuming, arguendo, that shortfall from potential is measurable, how is the population, against which the handicapped child's shortfall is to be judged, to be determined? A handicapped child in a population of overachievers would receive maximum help, but one in a population of underachievers would be severely deprived.

Buss & Kuriloff, Legal Reform of Special Education: Empirical Studies and Procedural Proposals, 62 Cal. L. Rev. 40, 47 (1974). Dissent by Judge Mansfield (A-A 18) ____F2d ___, __.

In this case, the Court of Appeals has upheld a judicially formulated definition of the goal of a federal statute, in spite of the fact that definitions of the goal were clearly enunciated in both the statute and the regulations. The definition so formulated failed to reflect the legislative intent, as set forth in the legislative history of the Act.

The Court of Appeals stated: "our decision is limited to the unique facts of this case and is not intended as an authority beyond this case" (A-A7). ____ F2d ___, ___. However, whether or not the decision of the Court of Appeals is cited as authority in future cases, its affirmance gives greater precedential value to the decision of the District Court. The definition of "free appropriate public education" formulated by the District Court has already been cited

by other courts in other cases arising under the Act: Battle v. Com. of Pa., 629 F.2d 269 (3rd Cir., 1980); Springdale School District v. Sherry Grace, 494 F.Supp. 266 (W.D. Ark., 1980); Hines v. Pitt County Board of Education, 497 F.Supp. 403 (E.D.N.C., 1980).

If this court does not review this case and make a determination concerning the District Court's definition, two consequences are possible: first, that the Court's definition will become the accepted interpretation of the statutory language; and second, that several District Courts or Courts of Appeal will redefine "free appropriate public education", with the result that the Federal act will be implemented differently in various jurisdictions. If the second alternative were to occur, states such as New York, which are located in more than one district, could be faced with insur-

mountable difficulties in attempting to administer the Act.

As Judge Sloviter stated in his separate opinion (concurring and dissenting in part) in Battle v. Com. of Pa.:

> There is nothing in the statute which would warrant anything other than a uniformly applicable interpretation of the nationally prescribed goal of a "free appropriate education".

629 F2d 269, 284.

Certiori should be granted so that this court may determine whether the District Court's formulation should supercede the definitions contained in the Act and the Regulations promulgated under them, whether the definitions contained in the statutory scheme are sufficient, or whether a new definition formulated by this Court should take precedence.

2. The failure of the Court of Appeals to order dismissal of the complaint upon a demonstration that the School District was in conformity with the State plan approved by the Federal Commissioner casts grave doubt on the validity, purpose and function of state plans under the Act.

In his dissent in the Court of Appeals, Judge Mansfield stated:

> Thus the scope and range of an appropriate education is left primarily to the states, which are given broad authority to prescribe the details of educational policy in individual cases and must present specific plans for approval to the United States Commissioner of Education who, if he finds that a state's plan is not in conformity with the Act and federal regulations thereunder, may withhold funding, with the state given a right of appeal to a federal court of appeals, 20 U.S.C. Section 1416. See, e.g., Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities").
>
> Pursuant to the Act the State of New York has adopted parallel legislation and the State Commissioner has promulgated specific regulations which do not require provision of a sign

> language interpreter. Moreover the state's plan for education of handicapped children, which does not provide for sign language interpreters, has been approved by the federal Commissioner. In view of the approved plan's specificity with respect to audiology services, and the statute's policy in favor of administrative determination of what services are appropriate, a very strong showing is required to depart from that policy. The showing here does not meet that test. (AA-15-20). ___F2d __,__.

This Court must address the question of what showing is necessary to set aside the State plan; and whether the court, rather than the Federal Commissioner, is the proper agency to consider that issue. Viewed from another perspective, this Court must address itself to the scope of federal review under Section 1415(e)(2) of the Act.

The Act defines an appropriate education as, essentially, one which "meet[s] the standards of the State education agency." 20 U.S.C. 1401(18). To be

eligible for assistance under the Act, a state must submit to the Commissioner evidence that it has developed a plan which sets forth in detail the policy and procedure (i.e., its standards) to ensure that each handicapped child receives "a free appropriate public education." 20 U.S.C. 1412(2)(B) and 1412(3). Once a state has demonstrated eligibility, it must then submit to the Commissioner a plan demonstrating that the funds received will:

> . . . be utilized by the State or any of its political subdivisions, only in a manner consistent with the goal of providing a free, appropriate public education for all handicapped children . . .

20 U.S.C. 1413(a)(2).

The Act requires the Federal Commissioner to measure and evaluate the impact and effectiveness of the State's efforts to ensure a free appropriate public

education, specifically in regard to handicapped children who are educated in regular classrooms, within each disability.[4] 20 U.S.C. 1418(b)(1)(C). The Commissioner is required to report the results of his evaluations to the Congress and to the public. Id.

The Regulations, at 45 C.F.R. 121a. 120-121, provide a complete scheme for submission of the State's plan to the Commissioner, and identify what the State plan must contain in order to merit approval.

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4. New York State submitted specific plans to the Federal Commissioner for the education of deaf children in regular classrooms in the State. The State's directive to its local districts is at 8 N.Y.C.R.R. 200.4 (d)(4)(A-K1).

The question of whether a local school district is providing an appropriate education must be resolved by inquiring whether such education is in conformity with the State's requirements, if the State's plan has been approved by the Commissioner.

In its decision, affirmed by the Court of Appeals for the reasons set forth therein, the District Court did not recognize the role of the Federal Commissioner. It failed to dismiss the case when the School District showed it was providing an appropriate education under the State plan. It held that under the Act:

> Aside from the HEW regulation quoted above it has been left entirely to the courts and the hearing officers to give content to the requirement of an "appropriate education" (Emphasis supplied) (A-C 11) 483 F.Supp. 528, 534.

In effect, the complaint in this case challenged the State's plan. The State's plan does not include provision for sign language interpreters for deaf pupils in regular elementary school classrooms. (Neither does it forbid it if that is what the local district elects to do.) Whether that is a correct judgment is for the Federal Commissioner to review, not the District Court.

The appeal procedure, 20 U.S.C. 1415 (e)(2), has not been provided to allow independent hearing officers and the courts to dictate to the states correct measures of remediation for particular classes of handicapped children. That is what the state plan is supposed to do. In formulating such a plan, the state has to take into account the resources it will devote to the various forms of remediation, the practicality and

feasibility of those measures and the likely efficacy of those measures, given the limitations of the state's resources.

The cost of interpretive services for Amy Rowley will be approximately $20,000 - $25,000 per year, at current rates. An extension of that cost to similarly situated deaf students in the State would cost over one hundred million dollars per year.

Judge Sloviter in his opinion (concurring and dissenting in part) in Battle v. Com. of Pa., 629 F2d 269, 284 (3rd Cir., 1980), stated:

> I agree with both of my colleagues that the contours of the state's program must be defined by the state. It is the state which must determine which specific programs should be offered, how those programs must be structured, and how the delicate and intricate balancing of funds and resources between handicapped and non-handicapped children must be managed. In the process, different states may establish somewhat varying immediate goals as steps toward realization of the federal policy.

If the District Court's opinion is correct, and it has been left entirely to the courts and hearing officers to determine what is an appropriate education, what limitations are placed upon the exercise of that discretion? Must the local school district do anything necessary to ameliorate the adverse impact resulting from a disability, regardless of cost? If that is the standard, cost considerations are irrelevant and Congress has created a scheme of unlimited liability for the states and local school districts.

A reading of the legislative history of the Act reveals that the question of financing at the federal, state and local levels was of paramount concern.

The Act was an effort to reconcile a number of competing interests: the desire of associations of handicapped persons to focus attention and funding on their needs, the desire of state and

local educational bodies to maintain their autonomy in deciding the manner and method of educational programs, and the need to apportion limited tax resources among a variety of valid, competing interests. The Act reconciled these competing forces by placing ultimate responsibility for the provision of a free appropriate public education on the states, under the state plans. The Court of Appeals' decision transfers that responsibility to hearing officers and district courts.

At the time Congress passed the Act, this Court had decided San Antonio School District v. Rodriquez, 414 U.S. 1, 93 S.Ct. 1287, 36 L.Ed. 2d 16 (1973), in which it held that education was not a right afforded explicit or implicit protection under the Constitution.

The Court said:

> The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's right to speak and to vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice. That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted. These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be implemented by judicial intrusion into otherwise legitimate state activities.
> 411 U.S. 1, 36.

It is highly unlikely that Congress, in passing the Act two years after this Court's decision in Rodriquez, intended to obliterate the distinctions of the Federal system. The more likely interpretation is that Congress intended the Act to be reflective of the distinctions in the Federal system; and to make the States responsive to the

mandate of the Act, as a condition for receipt of federal aid.

The appeal procedure is in place to allow the state, and ultimately the court, to determine whether the local district is providing a free appropriate public education. 20 U.S.C. 1414(b)(3).

The appeal procedure resolves issues of fact, not policy. It determines questions of correct diagnosis, correct placement in the least restrictive educational environment given the nature of the handicap, correct classification as a handicapped child, and correct placement in a particular educational institution. It is not in place to allow the federal court to step in and say that every regular class, containing a deaf child, in the State of New York has to have a sign language interpreter. That is a decision for the state to make, not the

court.

Those who disagree with the state's policy determination are not left remedyless. 20 U.S.C. 1412(7) provides that in formulating its plan the state shall assure that procedures for consultation with individuals concerned with education of the handicapped are established; and that public hearings are held, with adequate notice given, and an opportunity for public comment provided, before adoption of its plan.

The District Court's decision is not based on facts peculiar to Amy Rowley. In making its determination, the Court found a need for a sign language interpreter by extrapolating to Amy information applicable to all deaf children, and ignored testimony as to Amy's extraordinary academic achievements. The Court's method of reaching its decision, and the Court of Appeals' affirmance of that decision,

makes inevitable its application on an almost universal basis.

Certiori should be granted in order for this Court to delineate the roles of the individual states in formulating plans under the Act; the Federal Commissioner in overseeing those plans; and federal courts in reviewing the appropriateness of educational placements made by local educational agencies in conformity with state plans.

3. As the Act mandates assessment of the unique individual needs of handicapped pupils before placement can be made, the Court of Appeals erroneously affirmed the District Court decision, which was based on the perceived needs of a class of handicapped persons.

Under the Act, handicapped children are defined as those whose impairments mandate provision of special education and related services (20 U.S.C. 1401(1), 45 C.F.R. 121a.5)). Special education is defined as a specifically designed instruction to meet the unique needs of the child (20 U.S.C. 1401(16), 45 C.F.R.121a. 14(a) (1)). The "free appropriate public education" which is to be provided to handicapped pupils must, inter alia, conform to an individualized education program which is specially designed to meet the unique needs of the child (20 U.S.C. 1401(16) (19); 45 C.F.R. 14(a)(1)).

The statutory scheme mandates pro-

vision of an educational program which is based upon evaluation of the unique needs of the individual child, and which is designed to meet those needs in the least restrictive environment.

The Court of Appeals in this case affirmed the District Court decision which ignored the clear mandate of the Act, and it did so for the reasons set forth in that decision. In so doing, it has given great precedential weight to the proposition that it is the needs of the class of handicapped persons which should be looked to in evaluating the appropriateness of the handicapped pupil's placement, rather than the unique needs of the individual.

After developing its own definition of "free appropriate public education" the District Court found its own standard too difficult to apply. It therefore ignored all testimony as to Amy Rowley's

outstanding academic achievements, performance in class, and ability to comprehend what was taking place in the classroom; and focused instead on testimony as to general theories of the benefits to the deaf of the use of total communication.

Not one of the Plaintiffs' witnesses at the hearing before the Independent Hearing Officer, or at the trial in District Court, testified about Amy Rowley's classroom performance. Plaintiffs' only testimony which even approached the question of how Amy was performing in school was given by Amy's mother, Nancy Rowley. She said that she had observed Amy's class (R-T 72), but gave no details. However, the Respondents' witnesses, who had observed Amy, testified extensively as to her understanding of what transpired in the classroom, and her academic achievement.

The most detailed and exhaustive testimony on how Amy functions in class was given by the noted audiologist, Dr. Ann Mulholland, who said that Amy's hearing in the low frequencies is close to normal (R-T 373). She testified that when Amy was called from behind by her teacher, Amy turned around to face her (R-T 352). The same phenomenon was observed by another expert, Marianne Pappas, a year prior, in Amy's first grade class (R-A 143).

The testimony by Ms. Pappas (R-A 142 - 148) and Dr. Mulholland (R-T 342-392) about their verbal interaction with Amy in each of two academic years is moving and startlingly convincing evidence that Amy understands all of what is transpiring in her class. It was unrebutted.

Dr. Mulholland's testimony left no doubt that Amy is succeeding. Amy can

read and spell (R-T 347); she communicates with the children around her (R-T 349); she can do mathematics and help the children who are having difficulty (R-T 350-352); she is comfortably and gracefully accepted by her teacher and fellow students (R-T 356); and she scores well on both class and achievement tests (R-T 358-360). Dr. Mulholland said that a sign-language interpreter was not needed (R-T 360), and might be harmful (R-T 361). She said she felt that she had sufficient information to make a valid judgment, and that on the basis of her clinical experience Amy's education was appropriate and adequate. (R-T 391-392).

The testimony of the School District's witnesses also showed beyond doubt that the goals developed for Amy as part of her individualized education program were met. (Those goals are stated in the

IEP found at R-A 173-195.)

The District Court based its decision that Amy Rowley requires the services of a sign language interpreter in her classroom, not upon Amy Rowley's individual needs, but rather upon testimony that

> . . . there is a marked trend towards the use of total communication in the education of the deaf - a trend supported by studies showing the greater degree of success of students brought up in deaf households using total communication. (A-C 16) 483 F.Supp. 528, 535.

The Court of Appeals affirmed the District Court decision " . . . substantially for the reasons set forth in Judge Broderick's well reasoned opinions . . .". (A-A6) _____F2d _____, _____. However, the reasoning employed by the District Court in reaching its decision was clearly contrary to the manifest intent of the Act.

While the Act mandates a provision of

a special education designed to meet the unique needs of the handicapped child, the District Court ignored voluminous testimony concerning the unique needs of Amy Rowley, and based its decision on the following syllogism: deaf students can benefit from use of a sign-language interpreter; Amy Rowley is a deaf student; therefore Amy Rowley could benefit from use of a sign-language interpreter.

If this case is allowed to stand as precedent, courts could reach determinations under the Act, based on the category of handicapping condition, rather than on the unique needs of the individual pupil, and thus thwart the purpose of the statutory scheme.

4. The Court of Appeals erroneously held that the federal courts have jurisdiction to hear cases arising under the Education for All Handicapped Children Act without regard to the administrative procedures contained in the Act.

In sustaining the District Court, the majority of the Court of Appeals disregarded the statutory scheme, frustrated the intent of Congress, and exceeded the federal court's statutory jurisdiction.

The Act, as well as parallel legislation enacted in New York in 1976 (New York Education Law Section 4401 et. seq.), requires that each of the more than 200,000 school aged, handicapped children in New York be provided with a free appropriate public education. In enacting this legislation Congress imposed various conditions and duties upon local and state educational agencies to ensure that

these children would benefit from their educational placements (see 20 U.S.C. 1401 (17) & (18), 1413 and 1414), and established certain procedural safeguards that must be followed each time a handicapped child is identified, evaluated or placed (20 U.S.C. 1415).

Within the framework of these mandated procedures, Congress clearly defined the roles of the state and local educational authorities.

Under the Act, the status of each handicapped child must be reviewed by the local educational agency ("LEA") at <u>least once each year</u> (see also New York Education Law Section 4401 (1)). Upon completion of its review, which includes an evaluation of the child's progress in the present placement, the local educational agency must offer the child a free appropriate public education which will meet his special educational needs for

the next succeeding school year. If the parents or guardians of the child disagree with the placement offered by the LEA, they have the opportunity to seek a due process hearing at the local level before an inpartial hearing officer.

Thereafter, either party may appeal the hearing officer's decision to the State Commissioner of Education, who has the duty to conduct an impartial review of the hearing and make an independent decision upon completion of his review (20 U.S.C. 1415(c) & (d). It is incumbent upon the State Commissioner to review the placement offered for that year and to determine if it is educationally sound and is in compliance with the state plan.

In this case, the parents of Amy Rowley objected to the placement offered her by the Board of Education of the Hendrick Hudson Central School District

for the school year 1978-79, solely because it did not provide their child with the services of a sign language interpreter when academic subjects were being taught in the classroom. A hearing was held before an Independent Hearing Officer, and he found that the LEA was providing an appropriate education for that year.

On appeal, and after reviewing the record of the hearing held at the local level, Gordon Ambach, the New York State Commissioner of Education, determined that the child was receiving an appropriate education for the school year 1978-79.

Following Commissioner Ambach's determination relating to Amy's 1978-79 placement, the parents commenced an action against the Hendrick Hudson School District in the Federal District Court (S.D.N.Y.) in accordance with 20 U.S.C. 1415(e)(2). The parents' complaint

related solely to the LEA's failure to include a sign language interpreter in the individualized educational program (IEP) developed for the 1978-79 school year. The parents failed to join as Defendant, Commissioner Ambach, until the LEA moved to dismiss the complaint, inter alia, on that ground. The Commissioner could have provided the District Court with the records of the administrative proceedings. The failure to join him as a party resulted in a five month delay in the judicial proceedings below.

Subsequent to the commencment of the action below, but before the State Commissioner was made a Defendant, the parties stipulated that the District Court should review not only the child's educational placement for the school year 1978-79 but also her placement for the school year 1979-80, which had not yet

begun (A-D 3) 483 F.Supp. 536, 538.

The Commissioner objected to the court's jurisdiction to make a decision for 1979-80 without the benefit of prior administrative proceedings. The Court held that it had jurisdiction. (A-C 19) 483 F.Supp. 528, 533, and the Court of Appeals affirmed.

The appeal procedure established by the Act is in conformity with this Court's decisions underscoring the importance of local control of educational matters. (San Antonio Independent School District v. Rodriquez, supra; Milliken v. Bradley, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed 2d 1069 [1974]; Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 226, 21 L.Ed 2d 228 [1968]).

As this Court has recognized, local and state education agencies, rather than the courts, possess expertise in the

educational field. The statute specifically requires review of placement by the state agency, prior to commencement of court actions. Presumably, this was done in order that the courts would be able to review findings made by an agency possessing experience and expertise in the subject at issue.

It is only after the State Commissioner of Education has reviewed the placement of a handicapped child that appeals may be taken to state or federal courts. Under 20 U.S.C. 20 1415(e)(2) the only parties who may commence such appeals are those who have been aggrieved by the findings and decision of the state educational agency; either after a hearing before such agency under 20 U.S.C. 1415(b)(2), or after the review by the state educational agency, of a hearing conducted by the LEA, under 20 U.S.C. 1415c.

In this case the District Court permitted two parties to agree to submit to its jurisdiction Amy Rowley's placement for the 1979-80 school year. This placement had not been reviewed by the State Commissioner, administrative remedies had not been exhausted, and jurisdiction could not be conferred by consent of the parties. The Court of Appeals failed to address this jurisdictional issue.

This Court should grant Certiorari to decide the jurisdictional question, and to review this case in light of other holdings by this Court which have underscored the importance of local control of educational matters.

5. The Court of Appeals' attempt to limit the applicability of its decision to the facts of this case constituted error, in view of the national importance of the issue and the precedential weight its opinion has given to the District Court decision.

Section 0.23 of the Rules of the Second Circuit (U.S. Ct. of App. 2d Cir. Rule 0.23, 28 U.S.C.) reads as follows:

> "The demands of an expanding caseload require the court to be ever conscious of the need to utilize judicial time effectively. Accordingly, in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order.
>
> Where a decision is rendered from the bench, the court may deliver a brief oral statement, the record of which is available to counsel upon request and payment of transcription charges. Where disposition is by summary order, the court may append a brief written statement to that order. Since these statements do not constitute formal opinions of the court and are unreported and not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other

court. (emphasis added)

The majority of the Court of Appeals has cited the above rule in an attempt to limit its holding to the facts of the instant case, and preclude review by this Court. In Footnote 7 of its decision (A-A 7-8) ___ F2d ___, ___, the Court stated that, because of the unique facts involved, the decision may not be cited as authority in <u>any other</u> case.

The Second Circuit has misapplied the above rule to the instant case. The facts of this case are not unique, but rather are applicable to every handicapped child living within the jurisdiction of the Second Circuit.

The District Court concluded that every deaf child would fare better in the classroom with an interpreter, and therefore directed that an interpreter must be provided to Amy Rowley by the state and local educational agencies

(A-C 16) 483 F.Supp. 528, 535. It went further, and concluded that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children; and in order to gauge whether this opportunity has been given, the Court's holding requires that the potential of the handicapped child be measured and compared to his or her actual performance, and that the resulting differential or "shortfall" be compared to the shortfall experienced by non-handicapped children (A-C 11-12) 483 F.Supp. 528, 534.

The Court of Appeals specifically agreed with these conclusions, affirmed for the reasons set forth in the District Court's opinion and memorandum order, and stated "We are satisfied that the Court meticulously applied precisely the standard prescribed by Congress". (A-A 7), ___ F2d ___, ___.

While the Second Circuit attempted to limit the precedent value of its affirmance, the language of the District Court's decision has general application, and the affirmance adds great weight to its pronouncements. The District Court's decision cannot be ignored by future litigants. (See discussion, page 18, supra).

If the Second Circuit panel was correct when it adopted the District Court's ruling over the meaning of the Act, then that opinion should be citable and should provide guidance to future litigants. If not, it should at least be reviewable by this Court.

It is apparent to the Petitioners that only this Court can now answer these critical questions concerning the standards for the education of handicapped children in the Second Circuit and in the entire

country, and at the same time avoid unnecessary and wasteful litigation.

The Act is already over five years old, and yet very few cases seeking judicial interpretation of the Act have reached the courts. In light of the limited decision of the Court of Appeals, which failed to address numerous issues raised by the Petitioners, and further failed to enunciate a standard to be followed in the Circuit, it is anticipated that further litigation will be required to determine and apply a general standard, unless this Court now resolves the issue.

CONCLUSION

Wherefore, Petitioners respectfully request that this Petition for a writ of certiorari be granted.

Dated: December 11, 1980

Respectfully submitted,

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Appendices

A. Opinion, Court of Appeals for the Second Circuit, Filed July 17, 1980.

B. Order, District Court, S.D.N.Y., Entered January 2, 1980.

C. Opinion, District Court, S.D.N.Y., Entered October 17, 1980.

D. Memorandum Order, District Court, S.D.N.Y., Entered October 17, 1980.

E. Decision, New York State Commissioner of Education, April 10, 1979.

F. Decision, Independent Hearing Officer, January 12, 1979.

G. Judgment, Court of Appeals for the Second Circuit, Filed October 1, 1980.

H. Orders on Rehearing, Court of Appeals for the Second Circuit, Filed September 17, 1980.

I. Relevant Sections - Education of All Handicapped Children Act of 1975, 20 U.S.C. 1401, et. seq.

J. Relevant Sections - Education of the Handicapped Regulations, Assistance to States for Education of Handicapped Children, 45 C.F.R. Part 121a.

K. Regulations of the New York Commissioner, 8N.Y.C.R.R. 200.4(d)(4).

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1105—September Term, 1979

(Argued May 1, 1980 Decided July 17, 1980)

Docket No. 80-7098

Filed
July 17, 1980

AMY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY, in their own right,

Plaintiffs-Appellees,

v.

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants-Appellants.

Before:

MANSFIELD and TIMBERS, *Circuit Judges,*
and BONSAL, *District Judge.**

* Hon. Dudley B. Bonsal, United States District Judge for the Southern District of New York, sitting by designation.

Appeal from a judgment entered after a bench trial in the Southern District of New York, Vincent L. Broderick, *District Judge*, 483 F.Supp. 528, 483 F.Supp. 536, denying a motion by appellant Commissioner of Education to dismiss for lack of jurisdiction and directing appellants to provide a sign language interpreter in the classroom of appellee Amy Rowley, an eight year old deaf child.

Affirmed.

RAYMOND G. KUNTZ, Bedford Village, N.Y. (Teresa K. Kuntz, and Kuntz & Spletzer, Bedford Village, N.Y., on the brief), *for Defendant-Appellant Board of Education.*

PAUL E. SHERMAN, JR., Albany, N.Y. (Jean M. Coon, Albany, N.Y., on the brief), *for Defendant-Appellant Commissioner of Education.*

MICHAEL A. CHATOFF, Jamaica, N.Y., *for Plaintiffs-Appellees.*

DIANE SHISK, SEYMOUR DUBOW and MARC CHARMATZ, Washington, D.C.; Thomas K. Gilhool, Frank J. Laski and Beverly Lucas, Philadelphia, Pa., *filed a brief amici curiae for The National Association of the Deaf, Gallaudet College, and The American Coalition of Citizens with Disabilities.*

NORMAN H. GROSS, and McGivern, Shaw & O'Connor, Albany, N.Y., *filed a brief amicus curiae for The New York State School Boards Association.*

PER CURIAM:

This case is about Amy. She is eight years old. She is deaf and has been since birth. She needs a sign language interpreter in her classroom to enable her to have the same educational opportunity as her classmates. The district court, Vincent L. Broderick, *District Judge,* held that she is entitled by law to have such an interpreter. We agree and accordingly we affirm the judgment of the district court.

Amy Rowley presently is enrolled at the Furnace Woods School in the Hendrick Hudson Central School District, Peekskill, New York. In accordance with the requirements of federal law, The Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 *et seq.* (1978) (the Act), the School District prepared an individualized education program for Amy.[1]

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1 Unless otherwise stated, all statutory citations in this opinion are to sections of the Act as codified in 20 U.S.C.

Section 1414(a)(5) provides:

"[T]he local educational agency or intermediate educational unit will establish, or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate revise, its provisions periodically, but not less than annually".

In September 1978, when Amy entered the first grade, her program was prepared by the School District's Committee on the Handicapped and her teacher. Under the program Amy was placed in a regular

Her parents objected to the program because no provision was made for a sign language interpreter. Accordingly, they commenced proceedings under New York law for the administrative review provided by the Act.[2] When the School District's decision not to provide an interpreter was upheld by the Commissioner of Education of the State of New York, the Rowleys, individually and on behalf of Amy, commenced the instant action in the Southern District of New York under Section 1415(e)(2).[3] The School District was

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classroom and was provided with an FM wireless hearing aid. She was assigned to a one hour session each day with a tutor for the deaf and three hour-long sessions each week with a speech therapist.

The same services are still being provided. Although Amy is now in the second grade, the issue presented in this case is the same for both school years.

2 Procedural safeguards for the provision of free appropriate public education to handicapped school children are set forth in Section 1415.

Following the procedure established by the State of New York, the Rowleys first requested the District's Committee on the Handicapped to reconsider its recommendation. When the Committee finally refused to recommend that an interpreter be provided, the Rowleys appealed to an Independent Hearing Officer. The Officer upheld the decision of the Committee. His decision was appealed by the Rowleys to the Commissioner of Education of the State of New York.

3 Section 1415(e)(2) provides:

"Any party aggrieved by the findings and decision made [in the administrative proceedings pursuant to§ 1415] shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate."

named as defendant and the Commissioner subsequently was added as a necessary party defendant.

After a four day evidentiary hearing and after reviewing the records of the administrative proceedings, the district court made detailed findings of fact and concluded that Amy had been denied a "free appropriate public education" provided by the Act.[4] The court ordered the School District and the Commissioner to provide an interpreter during Amy's academic classes. 483 F.Supp. 528. The court also denied the Commissioner's motion to dismiss for lack of jurisdiction. 483 F.Supp. 536. From the judgment entered on the decisions of the district court, the School District and the Commissioner have appealed.

Our careful review of the record satisfies us that the district court's findings of fact are not clearly erroneous, but are adequately supported by the evidence. We also agree with the district court's conclusions of law. Accordingly, we affirm substantially

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4 The Act requires that all state and local educational agencies which receive funds under the Act provide each handicapped child with a "free appropriate public education". Sections 1412(1), 1414(a)(1).

A "free appropriate public education" is defined in Section 1401(18) as

> "special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate pre-school, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title."

Appellants concede that the definition of "special education", Section 1401(16), and "related services", Section 1401(17), and regulations promulgated pursuant to the Act, are sufficiently broad to encompass a sign language interpreter. Appellants nevertheless claim that an interpreter is not required in Amy's case.

for the reasons set forth in Judge Broderick's well-reasoned opinions of January 15, 1980, adding only the following brief observations of our own—chiefly to focus upon certain critical evidence.

Amy is the child of deaf parents. Since her birth, her parents have communicated with her by a method which includes the use of sign language, visual cues, the mouthing of words, and amplification.

Amy is a bright child. Despite her handicap, she performs above the median standard of her class. The district court attributed this to her intense desire to learn and the extraordinary degree of additional academic help and support she receives from her parents.

Like many deaf people, Amy has some residual hearing. In her classroom she uses an FM wireless hearing aid. She also reads lips. This is a limited skill, however, under the best of conditions. Many sounds are not visible on the lips and communication is impossible when the teacher and students are not facing Amy.

The district court found, based on the evidence before it, including Amy's auditory speech discrimination tests, academic records, and observations of her in the classroom, that Amy misses a substantial part of what goes on in her classroom. The court found that, while only 59% of what transpires is now accessible to Amy under her present individualized education program, with a sign language interpreter 100% would be accessible to her.

The court therefore concluded that the services of an interpreter were needed "to bring her educational opportunity up to the level of the educational opportunity being offered to her non-handicapped peers." 483 F.Supp. at 535. The court held that Amy was entitled by law to have an interpreter during any

school period when academic subjects are taught. We agree.

Section 1415(e)(2), *supra* note 3, provides that the district court's decision must be based "on the preponderance of the evidence".[5] The decision in the instant case clearly is supported by a preponderance of the evidence. Moreover, the court weighed and evaluated the evidence with great care. In affirming the judgment of the district court, we are satisfied that the court meticulously applied precisely the standard prescribed by Congress.[6]

Finally, we wish to emphasize the narrow scope of our holding. This is not a class action in which the needs of all deaf school children are being determined. The evidence upon which our decision rests is concerned with a particular child, her atypical family, her upbringing and training since birth, and her classroom experience. In short, our decision is limited to the unique facts of this case and is not intended as authority beyond this case.[7]

Affirmed.

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5 This is a different standard of proof than that which originally had been proposed. The initial bill passed by the House had provided that the determination of the state agency would be "conclusive in any court of the United States if supported by substantial evidence. . . ." H.R. 7217, 94th Cong., 1st Sess., *reprinted in* H.R. Rep. No. 332, 94th Cong., 1st Sess. 56 (1975).

6 Appellants also bring up for review the district court's ruling which admitted in evidence three affidavits which were attached to appellees' petition for review by the Independent Hearing Officer, but were not considered by him. We find it unnecessary to reach this claim, since the statutory standard of proof by a preponderance of the evidence has been compiled with in this case without reliance on the affidavits.

7 A majority of the panel of this Court which heard this appeal on May 1, 1980 voted shortly thereafter to affirm the judgment of the

MANSFIELD, *Circuit Judge* (Dissenting):

I respectfully dissent on several grounds. First, the district court, unaware that the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401, *et seq.*, already defines a "free appropriate public education," adopted an erroneous and impractical guideline or standard for determining whether a handicapped child's education is "appropriate" within the meaning of the pertinent sections of the Act, 20 U.S.C. §§ 1401(18), 1412(1), 1414(a)(1)(C)(ii), and regulations promulgated thereunder. Second, the court should first have given the state educational authorities, who have much more expertise in the education of handicapped children than the court, the opportunity to apply the proper standard and submit their determination before deciding the case. Third, in view of the paucity of evidence supporting the district court's findings, I believe the court erred in considering crucial hearsay affidavits that were not properly a part of the state administrative record or in evidence before it without giving the defendants an opportunity to cross-examine the affiants and offer rebuttal proof.

First a bit of undisputed background. The Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401, *et seq.* (the "Act"), obligates state and local educational agencies, as a condition to receiving federal grants under the Act, to develop and submit to the United States Commissioner of Education, a policy and

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district court and to do so pursuant to a provision of the Rules of our Court which would preclude citation of our decision as authority in any other case, thus recognizing what we believe to be the lack of precedential character of our decision in view of the unique facts of this case. We continue to adhere to this view.

procedure that will insure handicapped students a "free appropriate public education," 20 U.S.C. § 1412(1),[1] which is defined in 20 U.S.C. § 1401(18) as follows:

> "(18) The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title."

See also 45 C.F.R. § 121a.4.

A "special education" is defined, 20 U.S.C. § 1401(16), as follows:

> "(16) The term 'special education' means specially designed instruction, at no cost to parents or guardians, to meet the *unique needs* of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." (Emphasis added).

See also 45 C.F.R. § 121a.14.

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1 Title 20 U.S.C. § 1412(1) provides:

"§ *1412. Eligibility requirements*

"In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

"(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education."

"Related services" are defined, 20 U.S.C. § 1401(17), as follows:

> "(17) The term 'related services' means transportation, and such developmental corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children."

See also 45 C.F.R. § 121a.13.

Regulations promulgated under the Act, although they define in detail the term "audiology" and refer to specific services and equipment to be furnished as "related services" to children with hearing problems, 45 C.F.R. § 11a.13(b), do not refer to a sign language interpreter.

The Act and regulations thereunder require the state to formulate and revise annually an individualized education program (IEP) for each handicapped child, 20 U.S.C. § 1414(a)(5), and the parents of the child are entitled to participate in the development of the IEP, 20 U.S.C. § 1401(19). The handicapped child must be placed in the least restrictive educational environment, i.e., educated in classrooms with non-handicapped children, 20 U.S.C. § 1412(5)(B). They may be removed to special classes, separate schooling, or other locations, only if the severity of the handicap prevents education

in regular classes. 20 U.S.C. § 1412(5), 45 C.F.R. § 121a.550-556.

The State of New York has enacted legislation and promulgated regulations with respect to the education of handicapped children, which largely parallels the Act and federal regulations. N.Y. Education Law, §§ 4201-4210, 4351-57, 4401-09 (McKinney's); 8 N.Y.C.R.R. §§ 200.1, *et seq.* State law does not require provision of a sign language interpreter for deaf children. The state's plan outlining its policy and procedure for education of handicapped children pursuant to the Act has been approved by the United States Commissioner of Education.

Amy Rowley attends the Furnace Woods School in the Hendrick Hudson Central School District, where she commenced as a kindergarten pupil in 1977 and has progressed through the first grade into the second. She is largely deaf, but can distinguish vowel sounds and has significant residual hearing in the lower frequencies. The record is clear beyond dispute that the school authorities, in their efforts to comply with applicable state and federal laws, have made Herculean efforts to provide Amy with an education suitable to, and compensating for, her hearing deficiency, and that their efforts have so far met with remarkable success. With her deaf parents' approval, she was from the outset placed in a regular classroom setting. In anticipation of Amy's arrival, those teachers and administrators who would be communicating with her as the school's only deaf child took a special course in sign language. The School District purchased a teletype system to communicate visually with her parents, who are also deaf. After she was tested to determine her hearing level, she was provided with supplemental educational services,

including the regular services of a speech therapist. After trying several hearing aids it was decided that she should be furnished with an "Earmark F.M. Wireless," a discrete sound amplifying device which increases particular sounds but blocks out background noise. This has been successfully used by her.

To assay whether Amy would benefit from sign language interpretation the Board of Education of the Hendrick Hudson Central School District (the District) from February 27 to March 10, 1978, placed a sign language interpreter, Jack Janik, with her in her classroom. At the conclusion of his testing period the interpreter reported that she was functioning like any of the nonhandicapped children in the room and that she resisted interpretation, looking to the teacher rather than the interpreter and asking the teacher rather than the interpreter to repeat anything she did not understand. To the same effect Amy's first grade teacher, Regina Gloverman, testified before the state hearing examiner that when Amy's tutor for the deaf, Susan Williams, used sign language to tell Amy what Mrs. Gloverman was saying in class, Amy looked to Mrs. Gloverman, who uses sign language in communicating with Amy, rather than to the sign language interpreter for what was being said. When Amy was subjected to a sign language interpretation test in her second grade classroom by Dr. Norman Doctor, who acted as the teacher with Edward Cortez as sign language interpreter, she looked to Dr. Doctor, asking him to repeat whatever she failed to understand, rather than to the sign language interpreter.

In view of the foregoing lack of success in using the services of a sign language interpreter in the education of Amy, her school district concluded that one should

not be provided in her case. Susan Williams, the teacher of children with impaired hearing who was Amy's language tutor, testified on the basis of her working closely with Amy daily that a sign language interpreter would not make a significant difference in Amy's education but would, on the contrary, deter her interactions with her teacher and other children in the classroom. This testimony was corroborated by Ellen Garzione, a hearing therapist who worked with Amy three times a week for a half-hour each session, that a sign language interpreter would not be of any assistance to Amy, since she was achieving as well as, or better than, most other first graders. In the light of this persuasive evidence the Committee on the Handicapped of Amy's School District sensibly concluded that at least for the time being the appropriate education for Amy, tailored to her unique needs, was to continue with the supplemental services she was currently receiving, including teachers who had developed special knowledge in education of the deaf, the use of the F.M. Wireless set, one hour of instruction daily by a certified teacher of the deaf, and three hours of instruction weekly by a speech therapist.

For the most part these witnesses called by the defendants testified on the basis of their personal observation of Amy and assessment of her special needs and performance. Among the factors considered by them was her residual hearing (her father testified that it was "50%"), her performance on achievement tests, her development of facility at lip-reading, her ability to understand what was transpiring in her class, and her classroom activities. She is able to read and spell, to handle mathematics and help other children having difficulty, to score well in tests, and to gain a friendly

cooperative acceptance on the part of her teacher and fellow-students. An expert audiologist, Dr. Ann Mulholland, testified on the basis of her clinical experience with Amy's case that her education was appropriate and adequate.

In contrast to defendants' witnesses, none of the witnesses called by the plaintiff (either in the state administrative proceeding or at the later district court trial) testified on the basis of any personal observation of Amy in the classroom or knowledge of her individualized needs and activities. Instead, despite the statutory scheme of the Act, which prescribes a special program to suit each child's unique education needs, 20 U.S.C. §§ 1401(19), 1414(a)(5), they relied on the general principle that the best education for any deaf person is the "total communication" method, which includes sign language as one of its parts. In their view, which was accepted by the district court, "*every* deaf child fares better in class with an interpreter. 'Every' deaf child includes Amy Rowley." Their conclusion was based entirely on general formulations and guidelines, without reference to Amy's individual needs.

DISCUSSION

At the outset it should be noted that Judge Broderick premised his opinion on two basic errors. One is his misconception that "The Act itself does not define 'appropriate education'." On the contrary, the Act and regulations promulgated thereunder do define the term, see pp. 1-2, *supra*, and also define the terms "special education" and "related services" as used in the definition of "free appropriate education." For present purposes, the important aspects of these definitions is

that they (1) emphasize that the education "meet the standards of the State educational agency," (2) specify that the education be tailored to the "unique needs of the handicapped child" in each instance, and (3) nowhere mention or suggest use of a sign language interpreter, despite referring to specific services and devices that might be used in treating children with hearing loss (e.g., "lip-reading," "determination of the child's need for group and individual amplification, setting and fitting an appropriate aid").

Thus the scope and range of an appropriate education is left primarily to the states, which are given broad authority to prescribe the details of educational policy in individual cases and must present specific plans for approval to the United States Commissioner of Education who, if he finds that a state's plan is not in conformity with the Act and federal regulations thereunder, may withhold funding, with the state given a right of appeal to a federal court of appeals, 20 U.S.C. § 1416. See, e.g., *Epperson v. Arkansas,* 393 U.S. 97, 104 (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities").

Pursuant to the Act the State of New York has adopted parallel legislation and the State Commissioner has promulgated specific regulations which do not require provision of a sign language interpreter. Moreover the state's plan for education of handicapped children, which does not provide for sign language interpreters, has been approved by the federal Commissioner. In view of the approved plan's specificity with respect to audiology services, and the statute's policy in favor of administrative determination of what services are appropriate, a very strong showing is required to

depart from that policy. The showing here does not meet that test.

The second basic erroneous premise underlying Judge Broderick's decision was his use of a definition of "appropriate education" found in regulations promulgated under an entirely different statute that does not apply here, the Rehabilitation Act of 1873, Pub. L. 93-112, 29 U.S.C. §§ 701, *et seq.*, see 45 C.F.R. 84.33(b), which is designed to promote gainful employment for handicapped persons by developing rehabilitative services on an equal, non-discriminatory basis. Unlike the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401, *et seq.*, which governs the present case, the Rehabilitation Act of 1973, 29 U.S.C. §§ 701, *et seq.*, contains provisions for vocational rehabilitation services which specifically include services of sign language interpreters, 21 U.S.C. §§ 774(d), 777e, showing that when Congress wished to provide such services it knew how to do so.

Unaware of the Act's definition and using a definition found in a regulation promulgated under a different Act for a different purpose, Judge Broderick formulated a new standard—"that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children"—which he borrowed from a law review note, The Education for All Handicapped Children Act of 1975, 92 Harv. L. Rev. 1103, 1125-26 (1979). No support for this definition is to be found in the Act, its legislative history, or in regulations promulgated thereunder. Had Congress intended such a definition it would have enacted it rather than the one which was adopted in 20 U.S.C. § 1401(18), *supra*. The legislative history of the Act reveals that Congress was simply

concerned with insuring that handicapped children would become independent, productive citizens rather than that their potentials be compared with those of the non-handicapped. The Senate Report on the proposed legislation states:

> "With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services would increase their independence, thus reducing their dependence on society." S. Rep. No. 94-168, 94th Cong., 1st Sess., reprinted in [1975] U.S. Code Cong. and Ad. News, 1425, 1433.

This objective is confirmed by statements by various senators during debates on the bill.[2] In short, the aim of

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2 On June 18, 1975, Senator Williams, during the debates on the proposed Act, stated that

> "providing appropriate educational services now means that many of these individuals will be able to become a contributing part of our society, and they will not have to depend on subsistence payments from public funds." 121 Cong. Rec. 19492 (1975).

In debates with respect to the Conference Report on the Act he supported the previously expressed views of the Secretary of Health, Education and Welfare, stating that the goal of the Act was to enable handicapped persons to become "productive citizens, capable of contributing and even more, capable of self respect and pride which they so rightly deserve." 121 Cong. Rec. 37416 (1975). These views were endorsed by Senator Randolph, who stated that the bill must be passed "to give these children the educational services they need to compete in today's changing world." 121 Cong. Rec. 37410 (1975).

In the House Congressman Harkin expressed the same views, stating

> "With proper educational services provided now, at a young age, these children can become productive citizens, contributing to society instead of being left as burdens on our society." 121 Cong. Rec. 25541 (1975).

the Act is to develop a handicapped child's self-sufficiency.

The definition of "appropriate" education adopted by the district court, moreover, is unfeasible and imposes a standard that is impractical, if not impossible, to use as a means of evaluating the appropriateness of a handicapped child's education. The district court indulged in understatement when it observed:

> "The difficulty with the standard, of course is that it depends on a number of different measurements which are difficult to make. It requires that the potential of the handicapped child be measured and compared to his or her performance, and that the resulting differential or 'shortfall' be compared to the shortfall experienced by nonhandicapped children."

Attempting to evaluate an individual child's potential is an extremely difficult task, involving much speculation. "The response to almost any interesting question concerning the education of the handicapped is either that the answer is unknown or that no generalizable beneficial effect of a given treatment can be demonstrated," Kirp, Buss & Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals,* 62 Cal. L. Rev. 40, 47 (1974). The district court's definition would compound this problem by requiring educators to subject all nonhandicapped children in the same school district, or at least in the same class, to a battery of tests in an effort to determine their potentials and their relative shortfalls as compared with that of the handicapped child. The process, while theoretically possible, obviously imposes an impossible burden.

The language and legislative history of the Act demonstrate that Congress visualized a much more practical objective, i.e., an education for each handicapped child that would enable the child to be as free as reasonably possible from dependency on others, would enable the child to become a productive member of society, and would hopefully promote academic achievement by the child that would roughly approximate that of his or her nonhandicapped classmates. A child's unique needs are met whenever the child's IEP enables the child to meet those goals. See, in accord, *Armstrong v. Kline*, 476 F. Supp. 583, 604 (E.D. Pa. 1979). Judged by this standard, the IEP for Amy clearly complies with the Act without her having a sign language interpreter. She has an IQ of 122. Her scores on the Stanford Achievement and Metropolitan Achievement Tests are above her grade level and show that she is living up to the potential indicated by her IQ. Although one debatable test indicates she hears only 59% of the words spoken in class, her classmates probably hear substantially less than 100% due to inattention, daydreaming, and other causes.

The most important fact for our purposes is that Amy is performing academically above the median of her class, will become a productive member of society, and is well adjusted to her school, teacher and classmates. The district court's statement that her "IQ does not represent the full measure of her potential" is a generality, supported only by the suggestion of persons who never witnessed her in a classroom context, and thus are reduced to speculation. On the opposite side of the ledger is the view that provision of a sign language interpreter would not prepare her for later life in a world where she will not have such an

interpreter available at her elbow but will be forced to achieve self-sufficiency in society through lip-reading and maximization of the effectiveness of her residual hearing.

Since application of the proper standard could yield but one result, the action in my view should have been dismissed. But if doubt on that score existed, the proper procedure here, where there is substantial evidence pointing in different directions on the issue of whether Amy needed a sign language interpreter, was for the district court to remand her case to the state educational authorities for findings and conclusions based on application of the correct standard, before resolving the issues presented by this lawsuit. The rationale of this procedure is obvious: the state educational personnel have far more experience and greater expertise in this difficult area than does a district court. Appraisal of the evidence by those possessing superior capacity to do so, who would recommend disposition based on application of the correct standard would not only be of invaluable assistance to the court but would avoid the flood of litigation that may be expected in cases where the state educators have initially denied a child's application. Without denying the child the "second bite at the cherry" authorized by the Act, 21 U.S.C. § 1415(e)(2), this step also has the virtue of being consistent with the normal judicial procedure of allowing expert agencies the first opportunity to resolve difficult technical issues within the areas of their expertise. See, e.g., *Far East Conference v. United States,* 342 U.S. 570, 574 (1952). In making determinations based on specialized knowledge federal courts usually are less inclined to substitute their judgment for conclusions of

a specially trained hearing examiner than they otherwise would be.

Lastly, the district court erred in admitting into evidence and relying on certain additional hearsay proof directly relevant to the issues before it, prior to deciding the case. At trial the plaintiffs offered into evidence certain affidavits (Nancy Rowley, Mary Sheie and Michael Denninger) bearing on the question of whether Amy required a sign language interpreter, which had been excluded from the state record because they had been submitted after that record had been closed, 8 N.Y.C.R.R. 200.5(c)(8)(10).[3] On October 5, 1979, Judge Broderick sustained objections to the affidavits as hearsay and as not properly part of the record before the State Commissioner of Education but

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3 8 N.Y.C.R.R.§ 200.5(c)(8)(10) provides in pertinent part:

"(c) . . . an impartial, formal hearing . . . shall be conducted in accordance with the following rules:

* * * * *

"(8) The parents, school authorities and their respective counsel shall have an opportunity to present evidence and to confront and question all witnesses at the hearing. *Each party shall have the right to prohibit the introduction of any evidence the substance of which has not been disclosed to such party at least five days before the hearing.*

* * * * *

"(10) The impartial hearing officer shall render a decision and mail a copy of the decision to the parents and to the Board of Education not later than 45 calendar days after the receipt by the Board of Education of a request for a hearing. *The decision* of the impartial hearing officer *shall be based solely upon the record* of the proceeding before the impartial hearing officer, and shall set forth the reasons and the factual basis for the determination. . . ." (Emphasis supplied).

Accordingly the State Commissioner of Education based his decision upon "a review of the record before the hearing officer," in accordance with the Act, 20 U.S.C. § 1415(c), which provides that the State educational agency "shall conduct an impartial review of such hearing."

allowed plaintiffs to brief the issue of admissibility in their post-trial memorandum. As a result the defendants took no steps to call the affiants for cross-examination or to offer rebuttal proof, since there was no need to do so. More than three months after the trial had been completed, upon filing his decision on January 15, 1980, Judge Broderick simultaneously reversed himself, holding that, although the affidavits would be objectionable as hearsay if offered in the first instance in the district court, the State Commissioner had erred in not admitting and considering them pursuant to 8 N.Y.C.R.R. 279.4,[4] which allows a party filing a

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4 8 N.Y.C.R.R. § 279.4, upon which the district court relied, provides:

> "279.4 *Initiation of Review.* The party seeking review shall file with the Office of Counsel of the State Education Department the petition for review including any written argument, memorandum of law, and additional documentary evidence, and the notice of intention to seek review where required, together with proof of service of a copy of such documents upon the other party to the hearing."

When read in context with other portions of § 279 it seems clear that the "additional documentary evidence" refers to exhibits that had been offered before or admitted by the Impartial Hearing Officer but not included in the appellate record furnished by the local board of education or school district, which is only required to file "A copy of the transcript and of the decision of the hearing officer," 8 N.Y.C.R.R. § 279.2.

The district court's interpretation not only clashes with 8 N.Y.C.R.R. § 2005(c)(8)(10) but would permit a petitioner to obtain a trial *de novo* before the Commissioner of Education based on affidavits submitted under the guise of "documentary evidence" which had never been considered, tested by cross-examination or rebutted before the Hearing Officer. Nothing in 8 N.Y.C.R.R. § 279.4 indicates that affidavits were intended to be included in the term "documentary evidence." Nor does the regulation obligate the Commissioner to accept or give any weight to untested affidavits belatedly submitted.

The injustice of the district court's interpretation in the present case is readily apparent. Nothing prevented the petitioners from submitting the affidavits or live testimony by the affiants to the

petition to file "additional documentary evidence." He concluded that he had therefore considered the evidence as part of the record before the state educational agency.

This was patently error, amounting to a denial of due process. Had the evidence been properly introduced and admitted in the state proceedings the defendant Henrick Hudson Central School District would have been afforded the opportunity to cross-examine the three affiants and offer rebuttal proof. But since it was excluded there for late filing, no such opportunity ever existed. Similarly, because of the district court's exclusion of the evidence until it decided the case, the defendant School District never had the opportunity in the federal proceeding to exercise this basic right. The effect was to decide the case on the basis of untested, unrebutted affidavits, which is improper.

The majority's holding that this error may be disregarded on the ground that there is sufficient evidence to uphold the district court's decision "without reliance on the affidavits" (majority opinion, fn. 6), simply will not hold water. The affidavits were essential to the plaintiff's case because they constituted the only evidence in favor of the plaintiff's position which was based on observation of Amy, as distin-

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Hearing Examiner. Nor do the State Commissioner's regulations preclude petitioners who are surprised by any of a Hearing Examiner's findings or conclusions from moving to reopen the hearing and record in order to accept the new affidavits and give the defendants an opportunity to call the affiants for cross-examination or to submit rebuttal testimony or other proof. But to submit the new affidavits at the appellate level deprives the defendants of these basic rights. The Act and the state regulations clearly contemplate a complete trial before the Hearing Examiner and a review by the Commissioner, not a second trial before the Commissioner.

guished from testimony plaintiff had introduced of witnesses who had never seen her in or out of the classroom and were basing their opinions on general views regarding the advantages of the "total communication" theory. Defendants, on the other hand, offered numerous witnesses who testified on the basis of their personal observations of Amy that she was receiving an appropriate education. Moreover, the importance of the affidavit evidence was recognized by Judge Broderick, who stated:

> "The testimony of the plaintiffs' experts, however, was clearly applicable to Amy. Two of the affidavits submitted were from experts who had actually observed Amy in class and were able to express opinions concerning her education specifically. (*See* affidavits of Michael Deninger and Mary Sheie.)."

Since Judge Broderick actually relied on the affidavits we are in no position to state what his opinion would have been if they had not been erroneously admitted and considered by him.

For the foregoing reasons, I would reverse the judgment below with directions to dismiss the complaint or, in the alternative, with directions to refer the issues to the state educational authorities for further findings and recommendations according to the proper standard, with the Rowley, Deninger and Sheie affidavits to be excluded unless defendants are afforded the opportunity to cross-examine them and to offer rebuttal evidence.

550—7-21-80 • USCA—4498

OUTPUT SYSTEMS, INC., 157 Chambers St., N.Y. 10007, (212) 374-1234

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMY ROWLEY, by her parents and natural guardians, Clifford and Nancy Rowley, and Clifford and Nancy Rowley, in their own right,

Plaintiffs,

-against-

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, Westchester County, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants.

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79 Civ. 2139 (VLB)

ORDER

VINCENT L. BRODERICK, U.S.D.J.

This court heard evidence in the above-captioned matter on September 26, 27, 28, and October 5, 1979. Upon the bases to be set forth in the opinion to be filed herein, I find that the plaintiff has established her right to the relief requested. Accordingly, the decision of the Commissioner of Education dated April 10, 1979 is reversed and it is hereby

ORDERED, that the defendants provide the plaintiff with the services of a certified interpreter for the deaf during any school period in which academic subjects are taught.

/s/ Vincent L. Broderick
Vincent L. Broderick, U.S.D.J.

New York, New York
December 28, 1979

Entered January 2, 1980.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMY ROWLEY, by her parents guardians, Clifford and Nancy Rowley, and Clifford and Nancy Rowley, in their own right,

79Civ.2139 (VLB)

OPINION

Plaintiffs,

-against-

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, Westchester County, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants.

VINCENT L. BRODERICK, U.S.D.J.

I.

Eight-year old Amy Rowley and her parents have brought this action under The Education for all Handicapped Children Act of 1975 ("the Act"), 20 U.S.C. Section 1401 et seq., to review the decision of the New York State Commissioner of Education upholding the denial by the board of education of the Hendrick Hudson Central School District of their request that Amy, who is deaf, be provided with the services of a sign language interpreter in the classroom.[1] A hearing was held before this court

on September 26, 27, 28 and October 4, 1979 on plaintiffs' motion for a preliminary injunction. At the conclusion of the hearing the parties stipulated that the hearing would take the place of a trial on the merits. I issued an order dated December 28, 1979 directing that a sign language interpreter be provided for Amy. This opinion contains my findings of fact and conclusions of law under Rule 52(a), Fed.R.Civ.P.

The central issue is whether the refusal to provide Amy with a sign language interpreter in the classroom, made by the school district and sustained by the commissioner, deprives her of the "appropriate education" required by law. For the reasons which follow, I find that the plaintiffs have established by a preponderance of the evidence Amy's right to a sign language interpreter in the classroom.

II.

The following constitute my findings of fact in this case:

Amy Rowley is a deaf child and therefore "handicapped" within the meaning of the Act. Like most deaf individuals, she has some residual hearing. Amy's residual hearing is particularly good in the lower frequencies, where vowel sounds are distinguished. Since vowel sounds are particularly hard to lipread, this gives her a substantial advantage over deaf children who do not have the same residual hearing.

Amy's parents are both deaf. Since the time that they discovered her deafness, not long after she was born, they have raised Amy with the use of total communication. "Total communication" is a relatively new system of deaf education methods -- mouthing words, amplification, signing, touching, and visual cues. Its hallmark is its emphasis on communicating with a deaf person by simultaneously mouthing words and signing them. Total communication has gained increasing acceptance among deaf educators since the release of studies indicating that deaf children raised in deaf housholds where total communication is used fare better academically and emotionally than other deaf children.

Amy's parents, concerned with helping her accommodate to her handicap, and with her total intellectual and emotional well-being, trained her as a very young child in receptive and communicative techniques. Largely as a result of their work with her, Amy entered school with a much better ability to communicate and receive information and to establish social contact than most deaf children. At present, in the second grade, she is an excellent lipreader and uses amplification to make optimal use of her residual hearing. Amy's mother spends at least one hour a day going over school work with her. In addition, Amy's tutor for the deaf, who spends one hour with her each day, prepares her for upcoming classes so that she can participate with a slight advantage over the other students.

In the year before Amy was due to enter kindergarten, her parents approached the administrators of the Furnace Woods School, a public school where their son, a child with normal hearing, was already enrolled, to alert them to her hearing handicap. The principal of the school, Joseph Zavarella, and the other school administrators and teachers involved in Amy's case responded very constructively to the challenge they faced. A number of them took a minicourse in sign language interpretation. A teletype phone was installed in the principal's office to facilitate communication with the Rowleys at home. They conferred with Amy's parents to work out a program for Amy.

According to an agreement reached between the Rowleys and the school, Amy's kindergarten year began with a data-gathering trial period during which she was placed in a regular kindergarten class without any support services. At the end of the trial period it was decided to provide her with an FM wireless hearing aid.

In February of the kindergarten year a sign language interpreter, Jack Janik, was placed in Amy's class full-time for a two-week trial period. At the end of that period, Mr. Janik submitted a report which concluded that Amy did not need his services for that kindergarten class. His conclusion was based on the extraordinary sensitivity of Amy's kindergarten teacher to her needs and on Amy's resistance to the in-

terpretive services. It is clear from the report, however, and from a subsequent affidavit filed by Mr. Janik in connection with these proceedings, that his recommendation was strictly limited to the particular class for which he had rendered the service, and did not rule out the necessity of interpretation in other classes or in subsequent academic years.

Federal law requires that an individualized education program ("IEP") be established or revised annually for every handicapped child, 20 U.S.C. Section 1414(a)(5), and that the parents of the child participate in the development of such a plan, 20 U.S.C. 1401 (19). In the fall of Amy's first grade year, the school district set out to draw up such a plan.[2] The first stage in that process was to obtain a recommendation from the school district's Committee on the Handicapped ("COH").[3] The COH received expert evidence offered by the Rowleys to the effect that the services of a sign language interpreter are important in the education of a deaf child, visited a class for the deaf, and heard testimony from school teachers and other personnel familiar with Amy regarding her academic and social progress. The COH recommended that Amy be provided with: a) continued use of the FM wireless hearing aid; b) the services of a tutor for the deaf for one class hour every day; and c) the services of a speech therapist for three hour-long sessions per week. The COH concluded that Amy did not need the services of an interpreter at that time.

That recommendation was forwarded to the Furnace Woods School where it was incorporated in the IEP being drafted by Amy's teacher. Amy's teacher never met or conferred with the Rowleys in developing the draft IEP. The balance of the IEP contained a summary of Amy's academic progress and a statement of academic goals.

On December 6, 1978, school personnel met with Amy's parents to discuss the draft IEP. The Rowleys concurred with the program in all respects but one: they insisted that their daughter needed the services of a sign language interpreter for her academic classes. The IEP was sent back to the COH for review. The COH stood by its earlier recommendation that interpretive services not be provided.

The Rowleys demanded and received a hearing before an independent examiner on their objection to the IEP. When the examiner rendered a decision against them, they appealed that decision to the Commissioner of Education. Upon receiving the commissioner's decision upholding the independent examiner, they brought this civil action.

Amy received the support services recommended by the COH and provided for in the IEP throughout first grade and continues to receive them now. The Rowleys' only quarrel with the defendants remains the failure to provide interpretive services for their child.

Amy Rowley, who is now in the se-

cond grade,[4] is a remarkably well-adjusted child. She interacts with her classmates fairly well, and can communicate with them. They are aware of and have learned how to adjust to her handicap when communicating with her.[5] She is able to help her classmates with school assignments, and is occasionally called on my the teacher to do so.

Amy's interaction with her teachers has been even more successful than her interaction with her peers. All her teachers have been sensitive to her handicap and have made efforts to accomodate their teaching methods to it as much as possible by using the FM wireless, by speaking clearly for her, and by using visual cues. She usually responds accurately to the teacher's instructions and notifies the teacher from time to time if she has missed something. Amy and her teachers have developed an extraordinary rapport; since she is a bright and eager child, they have demonstrated great respect for her and have given her special responsibilities.

The plaintiffs submitted the results of a variety of auditory speech discrimination tests performed on Amy over the course of a couple of years. These tests measure a deaf child's ability to identify words which are spoken to her.[6] On the basis of these tests, I find that by making use of her hearing aids and her lipreading skills, which she would be doing under ideal classroom conditions, Amy can identify 59% of the words which are spoken to her. With

the use of "total communication" she can identify 100% of the words spoken to her.

Words spoken by a familiar speaker in a familiar context are, of course, easier to identify than words spoken under test conditions. Amy's discrimination level might on that basis be assumed to be higher than 59% in a classroom situation. Classroom conditions, however, do not often approach the ideal conditions of the testing room. Amy is likely to hear a great deal less when there is noise in the classroom, when more than one person speaks at one time, when backs of speakers are turned to her or films are being shown. Accordingly, I find that Amy is capable of discriminating considerably less than 100% of what is spoken in class -- probably in the neighborhood of 59%.

The defendants introduced results of academic achievement tests Amy had taken in her first grade. Amy's scores on the Metropolitan Achievement Test were about average for her class, and her scores on the Stanford Achievement Test, which was administered to her in sign language, were well above average.[7] Amy's school records establish that she is performing above the median for her class. She has an IQ of 122.

Taken as a whole, this information establishes that Amy is a very bright child who is doing fairly well in school. It also establishes that she understands considerably less of what goes on in class than she could if she were not deaf. Thus she is not learning

as much, or performing as well academically, as she would without her handicap.

The parties introduced conflicting evidence regarding the importance of an interpreter in the early years. While I accept the defendants' evidence that an interpreter is less necessary for the transmission of mechanical skills in the early grades than for the increasingly academic instruction of higher grades, I also find that anything missed in the classroom early in the learning process will have far reaching consequences.

The parties were also in conflict regarding the potential for disruption of an interpreter in the classroom. I find that the plaintiffs have established that an interpreter could be integrated into the classroom in a way which will not disrupt the class or adversely affect Amy's social interaction.

III.

The Act requires that every state receiving federal educational assistance have in effect a policy "that assures all handicapped children the right to a free appropriate public education." Id. at 1412. The Act itself does not define "appropriate education". The regulations promulgated thereunder supply a functional explanation:

> (b) Appropriate education. (1) For the purpose of this subpart, the provision of an appropriate education is

> the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of Sections 84.34, 84.35, and 84.36. 45 CFR 84.33(b) (emphasis supplied).

In addition, the Act itself provides two guidelines. The first, a procedural guideline already referred to (see page 5, supra), requires that an individualized education program be developed for every handicapped child at a meeting with the child's parents and educators, 20 U.S.C. 1414(a)(5), 1401(19)[8]. The second expresses a strong preference for "mainstreaming" handicapped children; it provides that they are to be educated with non-handicapped children to the "maximum extent appropriate". 20 U.S.C. 1412(5)(B).[9]

Aside from the HEW regulation quoted above, it has been left entirely up to the courts and the hearing officers to give content to the requirement of an "appropriate education". While in future years a "common law" will undoubtedly evolve out of the Act to provide guidance for subsequent judicial decision-making, it is much too early yet to find it. Enforcing the Right to an Appropriate Education: The Education

for All Handicapped Children Act of 1975, 92 Harv.L.Rev. 1103, 1125-27 (1979) (hereinafter, "Appropriate Education").

An "appropriate education" could mean an "adequate" education -- that is, an education substantial enough to facilitate a child's progress form one grade to another and to enable him or her to earn a high school diploma. An "appropriate education" could also mean one which enables the handicapped child to achieve his or her full potential. Between those two extremes, however, is a standard which I conclude is more in keeping with the regulations, with the Equal Protection decisions which motivated the passage of the Act, and with common sense. This standard would require that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children. Appropriate Education, supra at 1125-26. Since some handicapped children will undoubtedly have the intellecutal ability to do better than merely progress from grade to grade, this standard requires something more than the "adequate" education described above. On the other hand, since even the best public schools lack the resources to enable every child to achieve his full potential, the standard would not require them to go so far.

The difficulty with the standard, of course, is that it depends on a number of different measurements which are difficult to make. It requires that the potential of the handicapped child be measured and compared to his or her per-

formance, and that the resulting differential or "shortfall" be compared to the shortfall experienced by non-handicapped children.

In an attempt to establish that they have met the standard, defendants have relied on measurements of Amy's academic performance and descriptions of her behavior. The Committee on the Handicapped based its recommendation on the testimony of Amy's teachers and others who had observed her academic and social performance. The committee rejected as "one-sided" the expert opinions offered by the Rowleys concerning the impact on a deaf child's comprehension of various forms of communication. Amy's principal, Dr. Zavarella, who was ultimately responsible for the preparation of the IEP, testified, before the hearing officer and before me, that only her academic failure would convince the school district that she needed the services of an interpreter. Before me the school board relied heavily on the observations of Amy made by her own teachers and by deaf educators who were dispatched to the classroom for the purpose of making such observations. In finding that Amy is a bright, well-adjusted child who has enjoyed a find rapport with all of her teachers and is able to respond to their instructions, I have accepted virtually all of that testimony as true.

While this evidence firmly establishes that Amy is receiving an "adequate" education, since she performs better than the average child in her class and is advancing easily from grade

to grade, it establishes little more. I find that the defendants' emphasis on her academic performance and the suggestion that only academic deficiencies would induce them to provide Amy with an interpreter are based on an erroneous understanding of the law; they ignore the importance of comparing her performance to that of non-handicapped students of similar intellectual calibre and comparable energy and initiative.

The defendants have tried to repair the deficiency in their presentation by arguing in their post-trial brief that Amy's performance on the Stanford Achievement Test, which was well above average, shows that she is measuring up to the potential reflected in her IQ score of 122. If accurate, this is precisely the kind of information which would be most relevant to my decision in this case. The argument, however, is not supported by any evidence the defendants offered. The most direct support it received is a statement by one of the plaintiffs' witnesses, Dr. Donald Moores, to the effect that the Stanford Achievement Test score was probably a better indication of Amy's potential than the somewhat lower Metropolitan Achievement Test score. This is hardly persuasive support for the proposition that Amy's scores establish that she is learning all she would be learing if she were not deaf.

Moreover, Amy's IQ does not represent the full measure of her potential. The defendants' own witnesses have established by their testimony Amy's ener-

gy, her intellectual assertiveness, her rapport with her teachers and her interest in learning. These are significant elements of her potential which are not reflected in her IQ but which are undoubtedly reflected in the results of her achievement and other academic tests. It seems likely that much of Amy's energy and eagerness goes into compensating for her handicap; if the need for some of that compensation were eliminated, her energy could be channeled into greater excellence in classroom performance. It is unfair and contrary to law to penalize her for her own efforts and those of her parents, by which she has remained slightly above the median of her class.

The plaintiffs did not attempt to pursue this line of proof. They did, however, supply circumstantial evidence of deficiencies in Amy's education; evidence that Amy is capable of discriminating much less than 100% of what is said in class. The inevitable inference from that evidence is that she is understanding much less than 100%. While speech discrimination and understanding are not coterminous functions, the latter is clearly impossible without the former. That deficiency in Amy's understanding supports the conclusion that her educational shortfall is greater than that of her peers. While it is true, as defendants contend, that no child understands 100% of what is taught in class, the failures of other children can be attributed either to lack of intellectual potential, in which case, there is no shortfall relevant to the

standard described above, or to a lack of interest or energy, factors which can be controlled and which it is the purpose of a school to develop. Amy's lack of understanding, by contrast, is inherent in her handicap and is precisely the kind of deficiency which the Act addresses in requiring that every handicapped child be given an appropriate education.

In a different vein, the testimony and affidavits of the plaintiffs' experts concerning the superiority of total communication as a tool of education lent support to the inferences drawn from the word discrimination test results. The defendants have contended that no expert testimony which is not based on observations of Amy and which does not express opinions about her education specifically has any relevance to the appropriateness of that education. The testimony of the plaintiffs' experts, however, was clearly applicable to Amy. Two of the affidavits submitted were from experts who had actually observed Amy in class and were able to express opinions concerning her education specifically. (See affidavits of Michael Deninger and Mary Sheie.) All of the other experts testified that every deaf child fares better in class with an interpreter. "Every" deaf child includes Amy Rowley.

While it is true that the law requires that the needs of each individual handicapped child be assessed, and in keeping with that goal eschews any general formulations or guidelines, as a

practical matter those needs cannot be assessed without reference to generally accepted methods of special education for the handicapped. Appropriate Education, supra at 1127. Ideally, we would examine Amy Rowley in isolation and determine the services needed to bring her educational opportunity up to the level of the educational opportunity being offered to her non-handicapped peers. Given the difficulty of making such an assessment, however, it is useful to consider Amy as a member of a class of similarly handicapped children, a class about which a good deal of useful information is available. The plaintiffs' experts established by their testimony, which was in this respect largely uncontradicted, that there is a marked trend towards the use of total communication in the education of the deaf -- a trend supported by studies showing the greater degree of success of students brought up in deaf households using total communication. If there is something unique about Amy's situation which renders these generalizations less applicable to her, it is a uniqueness occasioned in large measure by her superior intellectual and personal abilities, for which she should not be penalized.[10]

Having found that Amy's academic education would be more "appropriate" with than without an interpreter, I must yet consider any negative impact the interpreter would have on her social development. The defendants have contended that the presence of an interpreter would be disruptive and would

isolate Amy from her classmates by singling her out as a handicapped child. These assertions are largely based, however, on the testimony of individuals, like Amy's teacher, who have had no experience with interpreters in the classroom -- that is, on pure speculation. They are also based to some extent on the observations and recommendations of an interpreter who was placed in Amy's classroom for a two-week trial period in the spring of her kindergarten year. That recommendation, however, which purported to be applicable only to her kindergarten year, is already over a year and a half old. Defendants also invoke the interpreter's report, which describes Amy's refusal to follow him rather than her teacher, in support of the proposition that Amy will not make use of an interpreter's services. There is no indication, however, that Amy was adequately coached to respond to this change in her classroom setting, or that she was given enough time to adjust to it. It is hard for me to believe that a child who has been raised with the use of total communication cannot be taught to follow an interpreter.

One of the plaintiffs' experts, Dr. Donald Moores, who has had experience with interpreters in the classroom, testified that a sensitive interpreter can minimize his disruptive impact on the classroom. In addition, he pointed out that the FM wireless currently used by Amy in class, which operates through a transmitter which students pass from hand to hand when they are reading aloud, is also potentially disruptive and also

draws the attention of other students to Amy's handicap. All of the testimony offered by both sides, however, establishes that Amy's classmates have adapted without difficulty to the presence of the wireless and have accepted Amy as their peer. There is nothing in the record to suggest that they will respond to the presence of an interpreter any differently.

/s/
Vincent L. Broderick,
U.S.D.J.

Dated: New York, New York
January 15, 1980

Entered October 17, 1980.

FOOTNOTES

1. The suit was originally brought against the school board, but the Commissioner of Education was thereafter joined as a necessary party.

2. An IEP had been developed for Amy in her kindergarten year with which her parents had concurred.

3. The COH is made up a psychologist, an educator, a physician, and the parent of a handicapped child.

4. Procedurally, this case is before me in a rather awkward posture. Technically, this court has jurisdiction to review only the IEP developed for the 1978-79 school year, which has long since passed. A motion was made to dismiss for lack of jurisdiction on that ground, which has been discussed and denied in a memorandum order filed simultaneously with this opinion. Since administrative remedies have not yet been exhausted with regard to the 1979-80 IEP, that IEP is not on review here now. In spite of the limited scope of my reivew, however, evidence concerning Amy's current status is relevant to my determination of the "appropriateness" of injunctive relief at this stage. See 20 U.S.C. 1415(e)(2). For that reason many of my findings relate to the present as well as to the past school year.

5. Plaintiffs and defendants have offered conflicting evidence on the issue of Amy's social interaction in

class. The plaintiff has submitted affidavits by expert observers which note that she seems somewhat isolated and makes herself understood to the other children only about 50% of the time. The defendants' witnesses testified that she communicates quite freely and well with her classmates. Since the evidence offered by the defendants on this issue was current while that offered by the plaintiffs was over 6 months old, I have found that Amy communicates or interacts fairly well with her classmates. There is no evidence, however, to suggest that her interaction is any more than superficial.

6. Amy has submitted to at least two such tests, one of which was administered on several occasions. The tests are very similar in format: A word is spoken to the deaf child and she must match it to one of four pictures in the test booklet before her. The tests were administered to Amy under a variety of conditions. Their results can be summarized as follows:

Word Identification by Picture Intelligibility Test ("WIPI")
With hearing aids only: 80%

Goldman - Fristoe - Woodcock Test ("GFW")
With hearing aids only: 43%
Noise subtest: 27%
With lipreading aids and lipreading: 59%
With hearing aids and lipreading repeated: 84%
With total communication: 100%

I find that 59%, on the GFW test, is the most relevant test score. WIPI tests had apparently been administered to Amy on a number of occasions before the results recorded above were obtained -- so numerous that she became quite familiar with it. The tests during which she was allowed both to lipread and to use her hearing aids best simulated classroom conditions. The same GFW test was administered twice on the same occasion with hearing aids and lipreading. The first of them, administered when the test was still new to her, would seem to reflect her speech discrimination ability more accurately than the repeated test.

7. Specifically, her scores on the Metropolitan Achievement Test were:

	Grade Equivalent	Percentile
1. Word knowledge	2.5	86
2. Word analysis	2.2	84
3. Reading	2.1	78
1 + 3 total reading	2.2	78
4. Total math	2.1	62

These scores were about average for her class.

Her scores on the Stanford Achievement

test were:

	Grade Equivalent
1. Vocabulary	3.3
2. Reading	
Part A	1.9
Part B	3.5
3. Math concepts	4.0
4. Math computation	4.5
5. Listening comp.	5.7

8. Section 1414. Application

(a) A local educational agency or an intermediate educational unit which desires to receive payments under section 1411(d) of this title for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall-

* * *

(5) provide assurances that the local educational agency or intermediate educational unit will establish, or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate revise, its provisions periodically, but not less than annually;

Section 1401. Definitions

* * *

(19) The term "individualized edu-

> cation program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, ...

Plaintiffs have contended that the school board failed to comply with these procedural requirements in developing the IEP. In light of my disposition of this case on the merits, I find it unnecessary to reach that issue.

9. Section 1412. Eligibility requirements

> In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:
>
> * * *
>
> (5) The State has established... (b) procedures to assure that to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped child-

> ren from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, ...

10. Defendants also contend that Amy is unique by virtue of her substantial residual hearing and her very good lipreading ability. While that contention is supported by the evidence, it does not appear to have the significance attributed to it by the defendants. Most deaf children have at least some residual hearing, and Amy's is not so great as to affect her classification as deaf. Regardless of her residual hearing and lipreading skills, her ability to discriminate speech is at a 59% level -- well below that of normal children. In addition, the plaintiffs' evidence suggests that Amy's skill may be attributed at least in part to her early training using total communication. It is likely then that her skills will continue to develop if total communication is used in the classroom.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMY ROWLEY, by her parents and natural guardians, Clifford and Nancy Rowley, and Clifford and Nancy Rowley, in their own right,

Plaintiffs,

-against-

79 Civ. 2139 (VLB)

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON SCHOOL DISTRICT, Westchester County, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

MEMORANDUM ORDER

Defendants.

VINCENT L. BRODERICK, U.S.D.J.

The facts of this case are set forth in the post-trial opinion filed simultaneously with this memorandum order. The purpose of this memorandum is to deal with two motions made during the course of the proceedings: the motion by the State Commissioner of Education to dismiss for lack of jurisdiction and the plaintiffs' motion to have included in the record affidavits which were attached to their petition to the Commissioner of Education but were apparently not considered by him in reaching his decision.

For the reasons which follow, I deny the defendant commissioner's motion and grant the plaintiffs' motion.

Amy Rowley is currently in the second grade of her neighborhood public school, the Furnace Woods School of the Hendrick

Hudson Central School District in Peekskill, New York. This is her third year in that school.

At a meeting held on December 8, 1978, Amy's parents, Clifford and Nancy Rowley, were presented with a draft of the individualized education program ("IEP") drawn up for Amy by her first grade teacher, setting out proposed educational goals and proposed support services for Amy's first grade year. As more fully set forth in the accompanying post-trial opinion, the Rowleys objected to the IEP on the grounds that it failed to provide for a sign language interpreter for Amy. The Rowleys demanded and received a hearing before an independent examiner, and subsequently appealed his adverse decision to the Commissioner of Education, who affirmed.

By following this procedure, the plaintiffs exhausted all of their administrative remedies concerning the 1978-79 IEP, and thus became entitled to bring this action for review. Before this case went to trial, however, a new school year had begun and a new IEP was due. The plaintiffs, understandably, will not be satisfied with a mere declaration that last year's IEP improperly failed to provide interpretive services; they seek an injunction to compel such services for the current year. In asserting this court's lack of jurisdiction, the commissioner has in essence argued that the plaintiff's may not seek relief applicable to the 1979-80 school year without exhausting their administrative remedies with respect to the 1979-80 IEP.[1]

Defendant commissioner appears to concede that the court has jurisdiction to review the 1978-79 IEP, as to which administrative review procedures were exhausted. Only mootness would strip the court of that jurisdiction. If mootness were accepted as a ground for refusing judicial review, the consequence might be that Amy's IEP would never have such review. Adoption of the 1979-80 IEP, which as of the time of trial had not yet been formulated, a hearing before an independent examiner and disposition of an appeal tc the commissioner would have to take place before the matter would once again be ripe for court consideration. The case would not reach court until mid school year at the earliest, and would be moot by the end of the year. Thus the conduct complained of is "capable of repetition, yet evading review," and calls for the invocation of a recognized exception to the mootness doctrine, e.g. Nebraska Press Association v. Stuart, 427 U.S. 539 (1976).

Having found that this court has jurisdiction to review the 1978-79 IEP, there is no need to find jurisdiction over the 1979-80 IEP. In a case in which jurisdiction is properly predicated on 20 U.S.C. Section 1415, the court is empowered to grant any "appropriate" relief, 20 U.S.C. Section 1415(e)(2), which would include injunctive relief extending beyond the school year at issue. Since the 1978-79 IEP should have contained a provision for a sign language interpreter (see accompanying post-trial opinion) and since Amy needs an interpreter just as much (if not more) in 1979-80 as she did in 1978-79, I find

that an injunction applicable to the 1979-80 school year is an appropriate form of relief.

II

Additional Evidence

At the hearing the plaintiffs moved to introduce affidavits which were attached to their petition to the Commissioner of Education, but which were apparently not considered by him in reaching his decision.[2] The defendants objected, contending that the commissioner properly refused to consider the affidavits and that they are not, therefore, a part of the record before this court.[3] I denied the plaintiffs' motion but permitted the parties to brief the issues and left open the possibility that my decision might be reopened. I now reverse my earlier decision and grant the plaintiffs' motion.

The Regulations of the Commissioner of Education, Section 279.4, provides that new matter can be filed in connection with the petition for review:

> Initiation of review. The party seeking review shall file with the Office of Counsel of the State Education Department the petition for review including any written argument, memorandum of law, and additional documentary evidence, and the notice of intention to seek review where required, together with proof of service of a copy of such documents upon the other party to

the hearing.

The respondent may also attach documents to his answer. Section 279.5.

The defendants appear to contend that while petitioners are allowed to submit documents, the commissioner may, in his discretion, refuse to consider them. Their interpretation would permit the commissioner to consider documents selectively -- to consider, for example, only those which support the commissioner's decision. That interpretation would raise serious due process and equal protection problems and would conflict with the plaintiffs' right under the federal statute to an "impartial review" at the state level. 20 U.S.C. Section 1415.

Defendants suggest, however, that the commissioner's discretion is not unfettered but rather guided by the following standard: only affidavits which contradict testimony offered at the hearing are rejected, unless there is some showing that they could not have been presented at the hearing. Since the defendants have failed to cite any authority for this proposition, I must assume that the practice is an unwritten one. As such, it operates to disadvantage individual petitioners who are less likely than school board respondents to be familiar with unwritten appeals procedures. Any reasonable person would infer from the regulation permitting attachment of documents that such documents will be considered by the commissioner; any other interpretation would render the procedural directions an exercise in futility. Accordingly, the commissioner is estopped

from denying his obligation to review such documents; they were a part of the record before him, which he erred in failing to consider, and they are a part of the record before this court.

SO ORDERED.

s/
Vincent L. Broderick, U.S.D.J.

Dated: New York, New York
January 15, 1980

Entered October 17, 1980.

FOOTNOTES

1. Before the joinder of the commissioner in this action, the plaintiffs and defendant School Board stipulated to put the appropriateness of the 1979-80 placement before the court without regard to the exhaustion requirement. As the defendant commissioner has quite accurately pointed out, however, the parties have no power to confer subject matter jurisdiction on the court by agreement.

2. The commissioner based his decision on "a review of the record before the hearing examiner." (Commissioner's Decision No. 9954, p. 3).

3. The documents consisted primarily of affidavits which would be objectionable as hearsay if sought to be introduced at the district court level.

No. 9954

The University of the State
of New York
The State Education Department
Before the Commissioner

IN THE MATTER OF THE

Application of a handicapped child, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Hendrick Hudson Central School District.

Michael A. Chatoff, Esq.
attorney for petitioners

Raymond G. Kuntz, Esq.
attorney for respondent

Petitioners appeal from the decision of an impartial hearing officer which sustained as appropriate the placement of their hearing-impaired daughter in a regular first grade class with supportive services provided by respondent. They seek an order directing respondent to appoint a sign language interpreter to aid and interpret for the child when academic subjects such as reading, mathematics, writing and spelling are being taught in the classroom.

Petitioners' child, who has a se-

vere hearing impairment, first attended kindergarten at the Furnace-Woods School in the respondent district during the 1977-78 school year. Prior to her entry there, the parents and school officials met to consider whether a regular classroom placement would benefit the child and what, if any, supplemental educational services should be provided in light of her handicapping condition. The parties ultimately agreed to place the child in a regular kindergarten program without any supplemental services at first so as to enable the district to have base data from which to evaluate the child's needs for such services.

During that year, the child was provided with the services of a speech therapist, and tests were conducted with an FM wireless system to determine if such a system would enhance the child's auditory perception. The child's physical skills, social interactions and maturation level were observed and tested throughout the year and the results were shared with petitioners. From February 27 to March 10, 1978, respondent placed a sign language interpreter in the child's classroom, and his presence there and its affect on petitioner's daughter were evaluated by the school principal and by the interpreter himself. In his written report made and filed at the conclusion of the two-week testing period the interpreter stated:

> "In general, interpreting was resisted by the child almost consistently except during story telling time which was approximately twenty minutes

a day for three days a week. The child functions like any of the other children in the classroom. She participates in all activities and assignments without any major problems. Her understanding of the English langue and how it works is average to above which makes it a lot easier lip-reading on her part since prior understanding of the language is conducive to lip-reading of same. As skillful as she is, the child does not get everything and when she does miss something, she stops the person and has the message repeated. In conclusion, I would like to say that as far as interpretive services are concerned, they are not needed at this time."

At the beginning of the 1978-79 school year, respondent's committee on the handicapped met and reviewed the child's academic performance in the kindergarten program at Furnace-Woods. On the basis of its review which included the interpreter's report, the committee recommended that the child continue at Furnace-Woods in a regular first grade program and be provided with certain supplemental services. The services include individualized instruction by a certified teacher of the deaf one hour per day and speech, auditory and speechreading training by a teacher of the speech and hearing handicapped on an in-

dividual basis for three hours per week.

Petitioners disagreed with the propriety of the committee's recommendation, in that it failed to provide for the services of a sign language interpreter, and requested a hearing, which was held on December 20, 1979.

The hearing officer found that respondent was providing the child with an appropriate educational program and that petitioners had failed to establish that a sign language interpreter is presently needed in the classroom setting while academic subjects are being taught.

From a review of the record before the hearing officer, I find that there was substantial evidence to support his findings and conclusions.

The basic contention of the petitioners is that the best way to impart information to a deaf person is through the use of "total communication", which they define as the simultaneous use of sign language, finger spelling and audible speech. The total communication method is being used in the home when communicating with the child and it is the parents' wish that this same method be used in the school setting with the aid of a sign language interpreter. In support of their contention, petitioners have submitted an affidavit by Robert Davila of Gallaudet College. Although Dr. Davila's affidavit is informative and does support the use of total communication as a general concept, there is no indication that he has ever met

petitioners' daughter, observed her in a classroom setting, reviewed her records or tested her for academic achievement. Several other documents supportive of the general concept of total communication were also submitted by petitioners, but again those documents do not address the educational development of the child in question. I also note that neither petitioner has ever observed the child in the present classroom setting, nor do they allege that she has not been progressing educationally, academically or socially.

The witnesses who testified on behalf of respondent clearly indicate that the child is progressing satisfactorily in her present placement and is considered at the top of the middle group in her class. The child's first grade teacher stated that the youngster has learned addition, subtraction and reading since coming to her class and, is in fact capable of assisting other pupils in the class. The child's other teachers and the school principal who have been observing her on a daily basis also agree that satisfactory progress is being made and that the presence of a sign language interpreter is not required at this time.

Since the petitioners have failed to show that the present placement offered by respondent is inappropriate, inadequate or unsuitable, there is no legal basis to grant the relief requested.

THE APPEAL IS DISMISSED.

(SEAL) IN WITNESS WHEREOF, I, Gordon M. Ambach, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 10th day of April, 1979.

/s/ Gordon M. Ambach
Commissioner of Education

DECISION OF IMPARTIAL HEARING
OFFICER TO BOARD OF EDUCATION

STATE OF NEW YORK
HENDRICK HUDSON SCHOOL DISTRICT

In the Matter of the Education

of

AMY ROWLEY

DECISION OF IMPARTIAL
HEARING OFFICER TO
BOARD OF EDUCATION

This is a decision following an Impartial Hearing in a proceeding to review a determination of the Committee on the Handicapped of Hendrick Hudson School District, pursuant to Education Law, Section 200.5. The Impartial Hearing, which the undersigned was appointed to conduct as Hearing Officer, occurred at the Administrative Offices of Hendrick Hudson School District, 61 Trolley Road, Montrose, New York, on December 20, 1978, and commenced approximately at 10:45 A.M. The Hearing terminated at approximately 5:15 P.M. on the same date. The parents of Amy Rowley, Clifford and Nancy Rowley, hereinafter referred to as "petitioners", were represented by Michael A. Chatoff, Esq., and Hendrick Hudson School District, hereinafter referred to as "respondent", was represented by the law firm of Kuntz & Spletzer, P.C., by Raymond G. Kuntz, Jr., Esq. Also, in attendance was Anita Polk, a sign language interpreter, Mary

Sheie, who also acted as sign language interpreter and Jane Raukohl, Administrative Assistant, Westchester County, office for the Handicapped.

The determination sought to be reviewed apparently declined to appoint an interpreter for the deaf to be present, assisting Amy during the hours of her attendance as a first grade student. The determination itself was not introduced into evidence.

Petitioners' witnesses were as follows:

1. Clifford and Nancy Rowley, parents of Amy Rowley.

2. Mary Sheie, a certified teacher of the deaf, certified interpreter for the deaf and a teacher of sign language.

Further in support of petitioners' contentions, Mr. Chatoff submitted eight exhibits which were introduced into evidence by stipulation (Page 8*). Petitioners' Exhibit No. 7, the affidavit of Taras B. Denis was stipulated into evidence with the understanding that the first sentence thereof be deleted from the Record. It should also be noted that Michael A. Chatoff, attorney for the petitioners, as well as the petitioners, Clifford and Nancy Rowley, were deaf and were required to use the services of a sign language interpreter, as well as the services of Mr. Raukohl and Ms. Sheie to assist them in hearing the course of the testimony given at the Hearing.

The following persons testified on behalf of respondent:

1. Joseph Zavarella, Principal of Furnace Woods Elementary School;
2. Susan Williams, a teacher for hearing impaired children at Northern Westchester Putnam County BOCES;
3. Ellen Garzione, a speech and hearing therapist, employed by respondent;
4. Regina Globerman, first grade teacher of Amy Rowley;
5. Barry Binder, school psychologist, employed by respondent; and
6. Marianne Pappas, resource teacher, certified in special education, employed by respondent.

The respondent also introduced eight exhibits. Respondent's Exhibit No. 7, the Individualized Education Program (IEP) for Amy Rowley was admitted over the objections of Mr. Chatoff for the sole purpose of establishing that an IEP was prepared by the respondent, but decision was reserved as to the validity thereof. Similarly, respondent's Exhibit No. 8, consisting of notes and correspondence relating to the IEP of Amy Rowley, were admitted over the objections of Mr. Chatoff. The transcript of proceedings does not indicate that respondent's Exhibit No. 8 was ever received in evidence. Nevertheless, Exhibit No. 8 was actually admitted in evidence with the same reservations as accorded to the IEP. The letter of petitioners' attorney dated January 3, 1978 implies this where it states:

"Nor does the transcript indicate that I objected to the admission into evidence of District Exhibit No. 8 for the same reasons that I objected to District Exhibit No. 7."

The salient issue is whether the District Committee on the handicapped erred in failing to provide a sign language interpreter to assist Amy while academic subjects were being instructed in her classroom. Secondary issues were (1) whether the Individualized Education Program (IEP) was properly developed, and (2) whether the petitioner are entitled to an independent educational evaluation, at District expense, for Amy.

In accordance with the Regulations of the Commissioner of Education, Section 200.5(c)(10), my decision is based solely on the Record of the proceedings. It should be noted at this point that the petitioners' particular requests for relief and the position they have advocated in behalf of their daughter, Amy, are primarily set forth in the Memoranda submitted by their attorney, Mr. Chatoff. Such Memoranda are not ordinarily considered part of the formal Record of Proceedings. Nonetheless, in view of the hearing handicap of the petitioners and their attorney, and in the interests of substantial justice, I deem the Memoranda part of the official Record only insofar as they set forth the claims of the petitioners. However, any factual conclusions will be made solely on the testimony elicited and the exhibits introduced at the Hearing.

The first witness to testify on behalf of petitioners was Mrs. Nancy Rowley, a certified teacher of the deaf and mother of Amy Rowley. Mrs. Rowley testified that upon learing that her daughter, Amy, was deaf, she began training her utilizing the so-called "total communication approach" (Page 18). Mrs. Rowley further stated that she wanted Amy to be taught in the total communication method so that Amy would have the same opportunity as hearing people. The second witness in behalf of petitioners was Mr. Clifford Rowley, a research chemist and father of Amy Rowley. Mr. Rowley also testified that upon learning of Amy's deafness, the total communication method was used to train her. The third and final witness who appeared on behalf of petitioners was Mary Sheie, a certified teacher of the deaf, a certified interpreter for the deaf and a teacher of sign language. Ms. Sheie testified that she favored the use of total communication in the education of deaf children. She indicated that when a child lip reads, he or she cannot understand everything that is spoken. The options available, she stated when all words are not understood, is to place the deaf child in a total communication situation which would include a person interpreter or teacher who is capable of communicating as close to 100% of the information as possible. She indicated that it is more common for a deaf child to nod its head in agreement than to say it does not understand. She also indicated that if an interpreter were used for a deaf child in a classroom setting, the need for a teacher to repeat for that child would be lessened. Ms. Sheie did not observe Amy in a classroom setting.

Petitioners' Exhibit No. 1, a letter from Joel D. Ziev to the District Committee on the Handicapped, in substance indicated that since he had not observed Amy in her school setting that he would be unable to either support or reject the use of an interpreter within the classroom setting.

Petitioner's Exhibit No. 3 was a Memorandum of a suit filed against the Akron Public Schools for the failure of that district to provide an interperter for a deaf child in the school system. The gist of the Memorandum was that in accordance with Federal regulations, the school district must consider the services of an interpreter as a supplemtary service before placing a deaf child in a separate class.

Petitioners' Exhibit No. 4 was an affidavit of Robert R. Davila, Vice President for Pre-College Programs at Gallaudet College, Washington, D.C., and President of the Council on Education of the Deaf. Dr. Davila has an impressive array of credentials and qualifications in the area of education for the deaf (see petitioners' Exhibit No. 5). The substance of Dr. Davila's affidavit is that public education depends almost totally on spoken communication and that a deaf student placed in a public school will be unable to receive the sensory input without the supplementary assistance of an interpreter. Dr. Davila also indicated that a lip reading deaf person would be unable to ascertain all spoken communications; lectures where the teacher turns his back to the class, group discussions,

the use of public address system, and the use of visual media with sound, all leave the deaf student at a disadvantage since lip reading cannot be fully utilized, if at all. He stated that the foregoing problems could be avoided by employing a qualified interpreter. He further indicated that the presence of an interpreter in the classroom would not be disruptive nor would it isolate the deaf child from other members of the class. Interpretive services, he also noted, when properly planned, have implemented and enhanced the communication and comradery and hearing among deaf students and that the interpreter becomes part of the educational process for all the children. He also indicated that an interpreter service provided for deaf students in regular classes has proved effective at the National Technical Institute for the Deaf and California State University at Northridge, and likewise, on the elementary level, in the Margaret S. Sterck School in Newark, Delaware and the San Diego School Districts and Santa Anna School Districts in California.

Petitioners' Exhibit No. 6 is a transcript of an address given by Dr. Richard G. Brill at a communications symposium, Maryland School for the Deaf, on March 13, 1970. The substance of Dr. Brill's speech was that all means should be used to get concepts, ideas, words and expressions into a deaf child's mind so that he will have the necessary tools needed for cognitive thinking. According to Dr. Brill, the so-called total communications method will be able to get more of the concepts, ideas, words and expressions into the deaf child's mind.

Utilizing this method at the California School for the Deaf in Riverside, it has been demonstrated that some three year olds have developed as many as 300 usable concepts manually while the typical number for a child using exclusively oral means is about 20. The substance of Dr. Brill's address is most aptly abbreviated as follows:

> "The important thing is to get information into the child's brain so that he will have it to use. It seems logical, then, to use every channel and every vehicle possible to get information and language into the child so that the teacher will have the opportunity to draw it out again in different forms and, in the educative process, teach the child to think. This means saturation with total communication". (Petitioners' Exhibit No. 6, Page 4).

Petitioners' Exhibit No. 7, affidavit of Taras B. Denis, a Guidance Counselor and Educator at the New York School for the Deaf, supports a classroom interpreter for Amy as the "unmistakable link between her home and her school . . .".

The first witness to testify on behalf of respondent was Mr. Joseph Zavarella, Principal of the Furnace Woods Elementary School where Amy Rowley is in attendance as a first grade student. Mr. Zavarella was first contacted by Amy's mother in the spring of 1976 concerning Amy's placement in a regular classroom setting. After several staff meetings

and discussions with Mrs. Rowley, arrangements for placement of Amy in kindergarten were made. It was understood that an assessment of Amy's needs would be made by observation of her in the classroom. An FM wireless system was ultimately purchased by the district to aid Amy in hearing, which system is still currently in use. Additionally, BOCES sponsored a basic sign language course at the Furnace Woods School which was attended by several staff members at Furnace Woods, including Sue Power, Amy's kindergarten teacher, Regina Globerman, her present teacher, another first grade teacher, the school nurse teacher and Mrs. Garzione, speech therapist.

The school also employed a sign language interpreter for a period of two weeks. The evaluation made of the sign language interpreter was that it was a non-essential service for Amy in the kindergarten setting. It was found that Amy was not paying attention to the interpreter and that on several occasions, the interpreter actually had to physically divert Amy's attention to him. It is to be noted that the interpreter, S.J. Janik, Jr., submitted an evaluation of the interpreter services he provided for Amy in kindgergarten, and he stated they were "not needed at this time". However, he did not rule out the fact they may be needed in the future (respondents' Exhibit No. 3). Mr. Zavarella's final conclusion was that interpreter services were not needed. Mr. Zavarella's observation of Amy in the classroom both formal and informal were made "almost daily".

Upon completion of kindergarten, an evaluation of Amy was made and it was recommended that she be placed in first grade with the continued use of the FM wireless system and placement in Regina Globerman's classroom. This placement was made as the result of conferences between Mr. Zavarella, Mr. and Mrs. Rowley and other unnamed individuals. Additionally, Amy receives one hour of services daily from a teacher of the deaf, Susan Williams, and three sessions per week with Mrs. Garzione, speech therapist.

On cross-examination, Mr. Zavarella revealed that if Amy had failed in the program being applied, a recommendation would be made that an interpreter is necessary. However, since Amy was a successful first grade student, he could not make such a recommendation.

Susan Williams next testified on behalf of the respondent. Mrs. Williams is employed by BOCES Northern Westchester Putnam County, as a teacher for hearing impaired children and is Amy's language tutor. She spends one hour daily with Amy in a supportive capacity: introducing the reading program that Amy will be given in her classroom working with Amy on second grade skills, introducing new vocabularly, writing language, story writing, etc. She also re-enforces the speech therapist's lessons. It was Mrs. Williams' opinion that Amy is doing better than average in her class, noting that Amy teaches other children what she has already grasped. She stated that Amy has a great capacity for learning, is a very eager student and a very happy,

positive child, who will advise when she does not understand something. She further indicated that an interpreter in the classroom would not make a significant difference in Amy's progress and abilities at the present time, and, that the interpreter could be a detriment in Amy's interactions with the teacher and other children in the classroom.

On cross-examination, Mrs. Williams testified that if Amy had been brought up in a total communication environment at home, the placement of Amy in a classroom without an interpreter would not result in a retrogression by Amy in her skills and learning ability. Mrs. Williams indicated that Amy was receiving the great bulk of information that was being presented in the classroom, and, that by drawing her attention away from her classmates and her teacher when Amy is doing very well in every aspect of her school experience, the interpreter would be a detriment. She offered a definition of "total communication" as follows:

> ". . . a person who uses signing and finger spelling and audible speech simultaneously is a person who would be using total communication."

Ellen Garzione, a speech and hearing therapist employed by respondent, testified that she meets with Amy three times a week for a half hour each time teaching language usage, pronunciation and articulation. She testified that Amy is progressing "fantastically well" in articulation and mastery of speech. She testified that she has observed Amy

informally in her classroom, lunchroom and in activities. She stated that an interpreter would be of no assistance to Amy insofar as the services that she provides for Amy, and nor would an interpreter in the classroom setting be of any assistance to Amy inasmuch as Amy is achieving as well as, or better than, the average first graders whom she has observed.

Regina Globerman, Amy's first grade teacher, testified that she communicates and teaches with Amy orally with a lot of demonstration. When something is introduced for the first time, it is gone over with the students step by step with demonstration. Mrs. Globerman also testified that she participated in sign language programs and uses sign language in communicating with Amy. She stated that when Amy first came to he class, she knew all the "readiness skills", knew the letters of the alphabet and their sounds and had a good basic concept of numbers. Initially, Amy could not read, but is now a capable reader, teaching others in the class. Amy has learned addition and subtraction. Mrs. Globerman also uses the FM wireless system as a supplementary devise to communicate with Amy, but this is not used all of the time. Amy presently ranks at the "top" in the middle group of the class, often assisting other children. It was Mrs. Globerman's opinion that a sign language interpreter would not be of any benefit to Amy because she is very teacher oriented.

On cross-examination, Mrs. Globerman indicated that this is her first exper-

ience with the education of a handicapped deaf child. She also indicated that she did not know if an interpreter would be necessary for Amy in the future. On re-direct examination, Mrs. Globerman indicated that neither Mr. or Mrs. Rowley came to observe Amy as a student in her classroom. She also testified that Mrs. Rowley had offered her material to aid her in the preparation of the Individualized Education Plan for Amy. Mrs. Globerman's earlier testimony indicated that a meeting in early December of 1978, a meeting was called to develop the IEP for Amy and that the IEP was merely read to Mr. and Mrs. Rowley. However, on re-direct, she indicated that Mr. Rowley had requested certain additions be placed in the IEP which were included in the final statement.

Mr. Zavarella was next recalled. He testified that a meeting was conducted on December 6, 1978 at the Furnace Woods Elementary School, which was attended by the petitioners, Mr. and Mrs. Rowley with an interpreter, Robin Reed, Mrs. Globerman, Mrs. Garzione, Mrs. Williams, Ms. Kausner, school psychologist, Mrs. Roberts, school nurse teacher and himself. The purpose of the meeting was to provide an opportunity for the parents to present their "input" on the IEP being developed for Amy. Mr. Zavarella indicated that there were extensive conversations with respect to the objectives to be reached and met for Amy in the first grade program. On re-cross-examination, Mr. Zavarella indicated that when the petitioners failed to approve the IEP because of the failure to include a sign language interpreter, the matter was

referred to the District Committee on the Handicapped.

Next to testify on behalf of the respondent was Barry Binder, school psychologist and a member of the District Committee on the Handicapped. Mr. Binder indicated that the Committee on the Handicapped heard testimony as to Amy's functioning in her classroom and assigned members to observe Amy in her classroom and also to observe alternative placements which might be necessary. The Committee on the Handicapped also explored a class for the deaf operated by BOCES in the Yorktown School system and also assigned Mrs. Pappas, another member of the Committee on the Handicapped, to observe Amy in the classroom. Mr. Binder indicated that Mr. and Mrs. Rowley attended all of the meetings of the Committee on the Handicapped and the final decision of the Committee on the Handicapped was ultimately conveyed to them.

Marianne Pappas, a resource teacher, certified in special education, employed by respondent, and a member of the District Committee on the Handicapped, testified she observed Amy in the classroom for one morning. Based on her observations, Mrs. Pappas found Amy to be very alert to the teacher and to other children -- a child with good work habits and skills, whose social and academic interactions are excellent. She further indicated that an interpreter would add nothing of value to Amy's educational progress or to her academic skills.

The final witness to testify was Mr. Clifford Rowley, who was recalled by Mr. Chatoff. On recall, Mr. Rowley indicated that two members of the Board of Education were concerned "about the money of hiring an interpreter". On examination by me, Mr. Rowley indicated that he first learned that Amy was deaf when she was two years old, and that with the assistance of hearing aids, Amy can hear "around 50%". When Mr. Rowley uses sign language with her, she understands 75% to 90% of the communication.

DECISION AND RECOMMENDATION

The written recommendation of the Committee on the Handicapped regarding Amy Rowley was never introduced into evidence by either party. During the course of testimony, references to it were made by Mr. Binder (Page 134) and by Mr. Chatoff (Page 153), and additionally, further references were made in the individual Memoranda submitted by opposing counsel. All of the references to the recommendation of the Committee on the Handicapped went uncontradicted, and accordingly, not having the same as part of the Record before me, I find that the Committee on the Handicapped recommended:

1. That Amy Rowley remain at the Furnace Woods School;

2. That she be provided the service of a certified teacher of the deaf for one hour daily;

3. That she receive the services of a speech therapist three times weekly; and

4. That she receive a formal written evaluation yearly.

The first issue to be decided is whether the petitioners are entitled to an independent educational evaluation of Amy at District expense. There is nothing in the Record to show that such an independent educational evaluation for Amy had ever been requested by the petitioners, let alone whether one had been denied by respondent. The only reference in the Record before me for an independent educational evaluation of Amy is contained in the opening statement of Mr. Chatoff (page 6), which is not evidence. Hence, it is my determination that the petitioners are not entitled to an independent educational evaluation of Amy.

The issue as to whether the Individualized Education Program for Amy was properly made and adopted poses more difficulty. The Regulations of the Commissioner of Education, Section 200.4 (f) state that the Individualized Education Program ". . . shall be a written statement to meet the unique needs of each handicapped pupil, which shall be developed in a planning conference. An individualized education program shall be prepared at the time the child enters the special education program, and shall be reviewed and, if appropriate, revised periodically, but not less than annually". Section 200.4(f)(2)(i) requires the

". . . conference for each new handicapped pupil shall be conducted as soon as possible, but no later than 30 days, after the child enters the special education program." The section further provides that the participants at the planning conference shall include the pupil's teacher, the pupil, whenever appropriate, the parents or legal guardian, a representative of the school district, other than the child's teacher, who is qualified to provide or supervise the provision of special education, or other individuals at the discretion of the parent or agency. It is also provided that notice of the planning conference be given to the parent or guardian.

The testimony of Regina Globerman, Amy's first grade teacher, first indicated that when she prepared the IEP for Amy she did not meet with the petitioners nor did she have any conferences with the petitioners with reference to same. She also initially indicated that a meeting was just to present to the petitioners what had been formulated as an educational program for Amy (Pages 101-103). On redirect examination, however, Mrs. Globerman testified that in preparing the initial draft of the IEP Mrs. Rowley knew that she was preparing the IEP and had even offered her a book on how to prepare an IEP. Mrs. Globerman further testified that a meeting was held on December 6, 1978, at which Mr. Rowley requested that certain additions be made to the IEP and that the same were included in the final draft of the IEP (respondent's Exhibit No. 7) (Pages 112-114). Mr. Zavarella then testified that a meeting was conducted on December 6, 1978 which was

attended by petitioners with an interpreter, Robin Reed, Mrs. Globerman, Mrs. Garzione, Mrs. Williams, Ms. Kausner, school psychologist, Mrs. Roberts, school nurse, and himself. Mr. Zavarella indicated the purpose of the meeting was to provide an opportunity for the parents to present their "input" on the IEP being developed for Amy (Pages 119-121).

It is my finding that the Individualized Education Program for Amy was properly made, although not within the time frame mandated by the Regulations of the Commissioner of Education. Section 200.4 does require a planning conference to develop the individualized education program, which conference is to include the parents of the handicapped pupil. This section does not indicate that the parents of the handicapped pupil must consent to the contents of the IEP or that the parents have the right of approval or disapproval of same. The uncontradicted testimony is that, in fact, a planning conference was held on December 6, 1978, which conference was attended by the petitioners herein, Amy's teacher, the Principal of the school, and several other staff members. The uncontradicted testimony also indicates that the petitioners had an opportunity to be heard and that some of their recommendations were inserted into the final IEP draft for Amy. It further appears that Amy was declared a handicapped child by the Committee on the Handicapped at a September, 1978 meeting and that in October, 1978, the Committee recommended placement in a regular first grade classroom with the supplementary services set forth above.

At a December 11, 1978 meeting of the Committee on the Handicapped, the petitioners presented an affidavit by Robert R. Davila of Galludet College. However, it appears the Committee only changed its original determination to the extent that a written evaluation of Amy be conducted yearly. The Commissioners Regulations require that the IEP be prepared at the time the child enters the special education program. (Commissioners Regulations, Section 200.4(f)). Accordingly, although I find the District has not strictly complied with the time requirements set forth in the Commissioners Regulations, I do find that the other procedures followed by the District to be in substantial compliance with the Regulations. Since there is no sanction for an untimely prepared IEP, I further find that the District's IEP shall be upheld.

Therefore, respondent's Exhibit No. 7 (The IEP) is admitted into evidence for all purposes and Exhibit No. 8 is admitted into evidence as proof of substantial compliance with the legal requirements set forth in the Commissioners Regulations.

The core issue of whether the Committee on the Handicapped erred in failing to provide a sign language interpreter to assist Amy while academic subjects were being instructed in her classroom is decided in favor of the respondent. It is my decision that on the Record before me, the petitioners have failed to establish by substantial evidence that a sign language interpreter

is presently needed by Amy in the classroom setting while academic subjects are being taught. The basic contention of the petitioners is that the best way to impart information into a deaf person's mind is through the use of "total communication". Total communication was defined as the use of signing, finger spelling and audible speech simultaneously, a definition apparently adopted by petitioners' attorney (Page 82). The total communications with her and they wish the total communication method to be continued in her school setting. To provide total communication in the school setting would require the services of a sign language interpreter. It is petitioners' basic contention that unless Amy is provided with the services of a sign language interpreter in the academic setting, she will be at a substantial disadvantage as compared to the other pupils who have normal hearing.

The affidavit of Robert R. Davila (petitioners' Exhibit No. 4) supported as a general concept the use of total communication is the education of deaf persons as did the transcript of the speech given by Dr. Richard G. Brill (petitioners' Exhibit No. 6). The affidavit of Taras B. Denis (petitioners' Exhibit No. 7) supported the use of a sign language interpreter for Amy in the classroom setting.

Dr. Davila's affidavit, while very erudite and informative, merely supports the use of total communication as a general concept. There is no indication that Dr. Davila has ever met Amy, observed her in a classroom setting, reviewed her records or tested her for

academic achievement. Likewise the transcript of Dr. Brill's speech, which incidentially, was made on March 13, 1970, could in no way relate to Amy except for the use of total communication as a general concept. The substance of Dr. Brill's address is that information must be imparted into the child's brain and that every channel and vehicle must be utilized to get the information there. However, no evidence whatsoever was introduced at the hearing which would indicate that Amy is not receiving the necessary information or that she is not progressing educationally and academically. In fact, the overwhelming and uncontradicted evidence is to the contrary.

Similarly, the affidavit of Taras B. Denis, while supporting the concept of an interpreter for Amy in the classroom, does not indicate the basis for such need. Mr. Denis does not indicate that he has ever observed Amy in the classroom setting nor does he indicate that Amy is not progressing academically, educationally, or socially. Accord ingly, while the above documents are supportive of the general concept of a sign language interpreter and are hence relevant, they do not provide any substantial evidence applicable to the particular educational development of Amy Rowley, and are accorded little weight.

The testimony of the petitioners, Clifford and Nancy Rowley, was very short and merely indicated that they utilized the total communication method in communicating with their daughter, Amy, and

wished the same to be carried through in the school setting. Neither Mr. nor Mrs. Rowley have ever observed Amy in the present classroom setting, nor did they allege that she was not progressing educationally, academically or socially. Mrs. Sheie, who also testified on behalf of petitioners, stated that she favored the use of total communication in the education of deaf children, however, she testified that she has not observed Amy in a classroom setting. There is no evidence that Mrs. Sheie had tested Amy as to her academic or social achievement nor did she indicate that Amy was deficient in any of these areas.

The witnesses who testified on behalf of respondent clearly indicated that Amy was achieving educationally, academically, and socially. Regina Globerman, Amy's first grade teacher, stated that Amy was achieving academically, having learned addition, subtraction and reading, and, is in fact, capable of aiding other pupils in the class. Mrs. Globerman indicated that Amy ranks at the "top" in the middle group of her class. Susan Williams, Amy's language tutor, noted that Amy was doing better than average in her class and also stated that Amy is able to assist other pupils in what she has already grasped. She also stated that Amy has a great capacity for learning and that Amy was receiving the great bulk of information that was being presented in the classroom. Ellen Garzione, Amy's speech and hearing therapist, stated that Amy was achieving as well as, or better than the average first grader she has observed. Marianne Pappas, a

resource teacher and a member of the District Committee on the Handicapped, and who observed Amy for one morning in the classroom stated that Amy had good work habits and skills and that her social and academic interactions are excellent. Regina Globerman, Susan Williams, Ellen Garzione and Marianne Pappas all unequivocally stated that a sign language interpreter was not needed for Amy in the classroom setting. Additionally, Joseph Zavarella, the Principal in Amy's school, who observed her almost daily, indicated the same. Both Regina Globerman and Joseph Zavarella indicated that if Amy was not achieving in the program currently being given to her, a recommendation would be made for a sign language interpreter. The testimony of the respondent's witnesses regarding Amy's academic and social progress went wholly uncontradicted. It is further to be noted that Amy does have some hearing ability when using hearing devices.

The Commissioner of Education of the State of New York has repeatedly held that a school district is obligated to provide its handicapped students with an adequate program, suitable to the individual student's educational needs. The district need not match or surpass a program offered by a private or special school. The petitioners herein have not addressed the appropriateness, suitability or adequacy of the education program arranged for Amy. The thrust of the evidence submitted by pettitioners is that total communication, i.e. sign language interpreter, be continued in the classroom setting. The petitioners

have not submitted any evidence to show that the present program is inappropriate, inadequate or unsuitable, while respondent has established that Amy is achieving academically and socially. Accordingly, I find that the program arranged for Amy Rowley as stated above is appropriate and determine that the same shall be continued through the remainder of the present school year. (See Matter of Charles J. McLester, Jr., Commissioners Decision #9287, 16 Ed. Dept. Rep. 29 and Appeal of Donald and Mary M, Commissioners Decision #9383, 16 Ed. Dept. Rep. 255.)

PLEASE TAKE NOTICE, that the petitioners, Clifford and Nancy Rowley, and the respondent, Hendrick Hudson School District, have a right to obtain a review of this decision by the Commissioner of Education of the State of New York in accordance with the provisions of Education Law of the State of New York Section 4404 and Public Law, 94-142.

Dated: January 12, 1979.

/s/ Albert P. Roberts
ALBERT P. ROBERTS
Hearing Officer
11 Market Street
Poughkeepsie, New York

12601

TO: CLIFFORD AND NANCY ROWLEY
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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 17th day of July, one thousand nine hundred and eighty.

PRESENT: HON. WALTER R. MANSFIELD

HON. WILLIAM H. TIMBERS
Circuit Judges

HON. DUDLEY B. BONSAL
District Judge

MAY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY, in their own right,

Plaintiffs-Appellees,

v.

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants-Appellants.

80-7098

Stamped as Filed in the
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
JULY 17, 1980
A. DANIEL FUSARO, Clerk

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellants.

A. DANIEL FUSARO,
Clerk

/s/ By: Arthur Heller,
Deputy Clerk

Seal of the
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 17th day of September, one thousand nine hundred and eighty.

PRESENT: HON. WALTER R. MANSFIELD

HON. WILLIAM H. TIMBERS
Circuit Judge

HON. DUDLEY B. BONSAL
District Judge

Circuit Judges.

AMY ROWLEY, by her parents and natural guardians, Clifford and Nancy Rowley, in their own right,

Plaintiff-Appellee,

v.

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, Westchester County, State of New York and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants-Appellants.

80-7098

A petition for a rehearing having been filed herein by counsel for the

appellant the Board of Education of the Hendrick Hudson Central School District,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. Daniel Fusaro
A. DANIEL FUSARO, Clerk

Filed September 17, 1980

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 17th day of September, one thousand nine hundred and eighty

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AMY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY, in their own right,

Plaintiffs-Appellees,

v.

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants-Appellees.

80-7098

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant The Board of Education of the Hendrick Hudson Central School District, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Filed Sept. 17,1980. /s/
Chief Judge

EDUCATION OF THE HANDICAPPED
20 U.S.C. 1401-1461

SUBCHAPTER I - GENERAL PROVISIONS

1401. Definitions

As used in this chapter -

(1) The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.

(2) The term "Commissioner" means the Commissioner of Education.

(3) The term "Advisory Committee" means the National Advisory Committee on Handicapped Children.

(4) The term "construction", except where otherwise specified, means (A) erection of new or expansion of existing structures, and the acquisition and installation of equipment therefor; or (B) acquisition of existing structures not owned by any agency or institution making application for assistance under this chapter; or (C) remodeling or alteration (including the acquisition, installation, modernization, or replacement of equipment) of existing structures; or (D) acquisition of land in connection with the activities in clauses (A), (B), and

(C); or (E) a combination of any two or more of the foregoing.

(5) The term "equipment" includes machinery, utilities, and built-in equipment and any necessary enclosures or structures to house them, and includes all other items necessary for the functioning of a particular facility as a facility for the provision of educational services, including items such as instructional equipment and necessary furniture, printed, published, and audio-visual instructional materials, tele-communications, sensory, and other technological aids and devices, and books, periodicals, documents, and other related materials.

(6) The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands and the Trust Territory of the Pacific Islands.

(7) The term "State educational agency" means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

(8) The term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools

in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(9) The term "elementary school" means a day or residential school which provides elementary education, as determined under State law.

(10) The term "secondary school" means a day or residential school which provides secondary education, as determined under State law, except that it does not include any education provided beyond grade 12.

(11) The term "institution of higher education" means an educational institution in any State which -

(A) admits as regular students only individuals having a certificate of graduation from a high school, or the recognized equivalent of such a certificate;

(B) is legally authorized within such State to provide a program of education beyond high school;

(C) provides an educational program for which it awards a bachelor's degree, or provides not less than a two-year program which is acceptable for

full credit toward such a degree, or offers a two-year program in engineering, mathematics, or the physical or biological sciences which is designated to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or other technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge;

(D) is a public or other nonprofit institution; and

(E) is accredited by a nationally recognized accrediting agency or association listed by the Commissioner pursuant to this paragraph or, if not so accredited, is an institution whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited: Provided, however, That in the case of an institution offering a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge, if the Commissioner determines that there is no nationally recognized accrediting agency or association qualified to accredit such institutions, he shall appoint an advisory committee, composed of persons specially qualified to evaluate training

provided by such institutions, which shall prescribe the standards of content, scope, and quality which must be met in order to qualify such institutions to participate under this Act and shall also determine whether particular institutions meet such standards. For the purposes of this paragraph the Commissioner shall publish a list of nationally recognized accrediting agencies or associations which he determines to be reliable authority as to the quality of education of training offered.

(12) The term "nonprofit" as applied to a school, agency, organization or institution means a school, agency, organization, or institution owned and operated by one or more nonprofit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

(13) The term "research and related purposes" means research, research training (including the payment of stipends and allowances), surveys, or demonstrations in the field of education of handicapped children, or the dissemination of information derived therefrom, including (but without limitation) experimental schools.

(14) The term "Secretary" means the Secretary of Health, Education and Welfare.

(15) The term "children with specific learning disabilities" means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language,

spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(16) The term "special education" means specifically designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

(18) The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

(19) The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are bing achieved.

(20) The term "excess costs" means those costs which are in excess of the average annual per student expenditure in a local educational agency during the preceding school year for an elementary or secondary school student, as may be appropriate, and which shall be computed after deducting (A) amounts received under this subchapter or under title I or title VII of the Elementary or Secondary Education Act of 1965, and (B) any State or local funds expended for programs which would qualify for assistance under this subchapter or under such titles.

(21) The term "native language" has the meaning given that term by section 703(a)(2) of the Bilingual Education Act.

(22) The term "intermediate educational unit" means any public authority, other than a local educational agency, which is under the general supervision of a State educational agency, which is established by State law for the purpose of providing free public education on a regional basis, and which provides special education and related services to handicapped children within that State.

1402. Bureau for education and training of handicapped; Deputy Commissioner: appointment and compensation; Associate Deputy Commissioner and other assistants to Deputy Commissioner.

(a) There shall be, within the Office of Education, a bureau for the education and training of the handicapped which shall be the principal agency in the

Office of Education for administering and carrying out programs and projects relating to the education and training of the handicapped, including programs and projects for the training of teachers of the handicapped and for research in such education and training.

(b)(1) The Bureau established under subsection (a) of this section shall be headed by a Deputy Commissioner of Education who shall be appointed by the Commissioner, who shall report directly to the Commissioner, be compensated at the rate specified for, and placed in, grade 18 of the General Schedule set forth in section 5332 of Title 5.

(2) In addition to such Deputy Commissioner, there shall be placed in such Bureau five positions for persons to assist the Deputy Commissioner in carrying out his duties, including the position of Associate Deputy Commissioner, and such positions shall be placed in grade 16 of the General Schedule set forth in section 5332 of Title 5.

1403. National Advisory Committee on Handicapped Children

Establishment; membership

(a) The Commissioner shall establish in the Office of Education a National Advisory Committee on Handicapped Children, consisting of fifteen members, appointed by the Commissioner. At least eight of such members shall be persons affiliated with educational, training, or research programs for the handicapped.

Functions of Committee; recommendations; report to Congress; termination of Committee

(b) The Advisory Committee shall review the administration and operation of the programs authorized by this chapter and other provisions of law administered by the Commissioner with respect to handicapped children, including their effect in improving the educational attainment of such children, and make recommendations for the improvement of such administration and operation with respect to such children. Such recommendations shall take into consideration experience gained under this and other Federal programs for handicapped children and, to the extent appropriate, experience gained under other public and private programs for handicapped children. The Advisory Committee shall from time to time make such recommendations as it may deem appropriate to the Commissioner and shall make an annual report of its findings and recommendations to the Commissioner not later than June 30 of each year. The Commissioner shall transmit each such report to the Secretary together with his comments and recommendations, and the Secretary shall transmit such report, comments, and recommendations to the Congress together with any comments or recommendations he may have with respect thereto. The Advisory Committee shall continue to exist until October 1, 1977.

Authorization of Appropriations

(c) There are authorized to be appropriated for the purposes of this

section $100,000 for the fiscal year ending June 30, 1974, and for each of the three succeeding fiscal year.

1404. Acquisition of equipment and construction of necessary facilities

Authorization for use of funds

(a) In the case of any program authorized by this chapter, if the Commissioner determines that such program will be improved by permitting the funds authorized for such program to be used for the acquisition of equipment and the construction of necessary facilities, he may authorize the use of such funds for such purposes.

Recovery of payments under certain conditions

(b) If within twenty years after the completion of any construction (except minor remodeling or alteration) for which funds have been paid pursuant to a grant or contract under this chapter the facility constructed ceases to be used for the purposes for which it was constructed, the United States, unless the Secretary determines that there is good cause for releasing the recipient of the funds from its obligation, shall be entitled to recover from the applicant or other owner of the facility an amount which bears the same ratio to the then value of the facility as the amount of such Federal funds bore to the cost of the portion of the facility financed with such funds. Such value shall be determined by agreement of the parties or by action brought in the United States

district court for the district in which the facility is situated.

1405. Employment of handicapped individuals

The Secretary shall assure that each recipient of assistance under this chapter shall make positive efforts to employ and advance in employment qualified handicapped individuals in programs assisted under this chapter.

1406. Grants for removal of architectural barriers; authorization of appropriations

(a) Upon application by any State or local educational agency or intermediate unit the Commissioner is authorized to make grants to pay part or all of the cost of altering existing buildings and equipment in the same manner and to the same extent as authorized by the Act approved August 12, 1968 (Public Law 90-480), relating to architectural barriers.

(b) For the purpose of carrying out the provisions of this section, there are authorized to be appropriated such sums as may be necessary.

* * *

1412. Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that --

(A) there is established (i) a goal of providing full educational opportunity to all handicapped children, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of

three and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

(C) all children residing in the State who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

(D) policies and procedures are established in accordance with detailed criteria prescribed under section 1417(c) of this title; and

(E) the amendment to the plan submitted by the State required by this section shall be available to parents, guardians, and other members of the general public at least thirty days prior to the date of submission of the amendment to the Commissioner.

(3) The State has established priorities for providing a free appropriate public education to all handicapped children, which priorities shall meet the

timetables set forth in clause (B) of paragraph (2) of this section, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

(4) Each local educational agency in the State will maintain records of the individualized education program for each handicapped child, and such program shall be established, reviewed, and revised as provided in section 1414(a)(5) of this title.

(5) The State has established (A) procedural safeguards as required by section 1415 of this title, (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and adminis-

tered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(6) The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency.

(7) The State shall assure that (A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents or guardians of handicapped children, and (B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs and procedures required pursuant to the provisions of this section and section 1413 of this title.

1413. State plans

Requisite features

(a) Any State meeting the eligibility requirements set forth in section 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Commissioner, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as he deems necessary. Each such plan shall --

(1) set forth policies and procedures designed to assure that funds paid to the State under this subchapter will be expended in accordance with the provisions of this subchapter, with particular attention given to the provisions of sections 1411(b), 1411(c), 1411(d), 1412 (2), and 1412(3) of this title;

(2) provide that programs and procedures will be established to assure that funds received by the State or any of its political subdivisions under any other Federal program, including section 241c-1 of this title, section 844a(b)(8) of this title or its successor authority, and section 1262(a)(4)(B) of this title, under which there is specific authority for the provision of assistance for the education of handicapped children, will be utilized by the State, or any of its political subdivisions, only in a manner consistent with the goal of providing a free appropriate public education for all handicapped children, except that nothing in this clause shall be construed to limit the specific requirements of the laws governing such Federal programs;

(3) set forth, consistent with the purposes of this chapter, a description of programs and procedures for (A) the development and implementation of a comprehensive system of personnel development which shall include the in-service training of general and special educational instructional and support personnel necessary to carry out the purposes of this chapter are appropriately and adequately prepared and trained, and effective procedures for acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and (B) adopting, where appropriate, promising educational practices and materials development through such projects;

(4) set forth policies and procedures to assure --

(A) that, to the extent consistent with the number and location of handicapped children in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services; and

(B) that (i) handicapped children in private schools and facilities will be provided special education and related services (in conformance with an individualized educational program as required by this subchapter) at no cost to their parents or guardian, if such children are

placed or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all handicapped children within such State, and (ii) in all such instances the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies;

(5) set forth policies and procedures which assure that the State shall seek to recover any funds made available under this subchapter for services to any child who is determined to be erroneously classified as eligible to be counted under section 1411(a) or 1411(d) of this title;

(6) provide satisfactory assurance that the control of funds provided under this subchapter, and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this subchapter, and that a public agency will administer such funds and property;

(7) provide for (A) making such reports in such form and containing such information as the Commissioner may require to carry out his functions under this subchapter, and (B) keeping such records and affording such access thereto as the Commissioner may find necessary to assure the correctness and verification

of such reports and proper disbursement of Federal funds under this subchapter;

(8) provide procedures to assure that final action with respect to any application submitted by a local educational agency or an intermediate educational unit shall not be taken without first affording the local educational agency or intermediate educational unit involved reasonable notice and opportunity for a hearing;

(9) provide satisfactory assurance that Federal funds made available under this subchapter (A) will not be commingled with State funds, and (B) will be so used as to supplement and increase the level of State and local funds expended for the education of handicapped children and in no case to supplant such State and local funds, except that, where the State provides clear and convincing evidence that all handicapped children have available to them a free appropriate public education, the Commissioner may waive in part the requirement of this clause if he concurs with the evidence provided by the State;

(10) provide consistent with procedures prescribed pursuant to section 1417 (a)(2) of this title, satisfactory assurance that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid under this subchapter to the State, including any such funds paid by the State to local educational agencies and intermediate educational units;

(11) provide for procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of handicapped children (including evaluation of individualized education programs), in accordance with such criteria that the Commissioner shall prescribe pursuant to section 1417 of this title; and

(12) provide that the State has an advisory panel, appointed by the Governor or any other official authorized under State law to make such appointments, composed of individuals involved in or concerned with the education of handicapped children, including handicapped individuals, teachers, parents or guardians of handicapped children, State and local education officials, and administrators of programs for handicapped children, which (A) advises the State educational agency of unmet needs within the State in the education of handicapped children, (B) comments publicly on any rules or regulations proposed for issuance by the State regarding the education of handicapped children and the procedures for distribution of funds under this subchapter, and (C) assists the State in developing and reporting such data and evaluations as may assist the Commissioner in the performance of his responsibilities under section 1418 of this title.

Additional assurances

(b) Whenever a State educational agency provides free appropriate public education for handicapped children, such State educational agency shall include,

as part of the State plan required by subsection (a) of this section, such additional assurances not specified in such subsection (a) of this section as are contained in section 1414(a) of this title, except that funds available for the provision of such education or services may be expended without regard to the provisions relating to excess costs in section 1414(a) of this title.

Notice and hearing prior to disapproval of plan

(c) The Commissioner shall approve any State plan and any modification thereof which --

(1) is submitted by a State eligible in accordance with section 1412 of this title; and

(2) meets the requirements of subsection (a) and subsection (b) of this section.

The Commissioner shall disapprove any State plan which does not meet the requirements of the preceding sentence, but shall not finally disapprove a State plan except after reasonable notice and opportunity for a hearing to the State.

1414. Application

Requisite features

(a) A local educational agency or an intermediate educational unit which desires to receive payments under section 1411(d) of this title for any fiscal year

shall submit an application to the appropriate State educational agency. Such application shall --

(1) provide satisfactory assurance that payments under this subchapter will be used for excess costs directly attributable to programs which --

(A) provide that all children residing within the jurisdiction of the local educational agency or the intermediate educational unit who are handicapped, regardless of the severity of their handicap, and are in need of special education and related services will be identified, located, and evaluated, and provide for the inclusion of a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving such education and services;

(B) establish policies and procedures in accordance with detailed criteria prescribed under section 1417(c) of this title;

(C) establish a goal of providing full educational opportunities to all handicapped children, including --

(i) procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under section 1413(a)(3) of this title;

(ii) the provision of, and the establishment of priorities for providing,

a free appropriate public education to all handicapped children, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education;

(iii) the participation and consultation of the parents or guardian of such children; and

(iv) to the maximum extent practicable and consistent with the provisions of sectin 1412(5)(B) of this title, the provision of special services to enable such children to participate in regular educational programs;

(D) establish a detailed timetable for accomplishing the goal described in subclause (C); and

(E) provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal described in subclause (C);

(2) provide satisfactory assurance that (A) the control of funds provided under this subchapter, and title to property derived from such funds, shall be in a public agency for the uses and purposes provided in this subchapter, and that a public agency will administer such funds and property, (B) Federal funds expended by local educational agencies and intermediate educational units for programs under this subchapter (i) shall be used to pay only the excess costs directly

attributable to the education of handicapped children, and (ii) shall be used to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of handicapped children, and in no case to supplant such State and local funds, and (C) State and local funds will be used in the jurisdiction of the local educational agency or intermediate educational unit to provide services in program areas which, taken as a whole, are at least comparable to services being provided in areas of such jurisdiction which are not receiving funds under this subchapter;

(3)(A) provide for furnishing such information (which, in the case of reports relating to performance, is in accordance with specific performance criteria related to program objectives), as may be necessary to enable the State educational agency to perform its duties under this subchapter, including information relating to the educational achievement of handicapped children participating in programs carried out under this subchapter; and

(B) provide for keeping such records, and provide for affording such access to such records, as the State educational agency may find necessary to assure the correctness and verification of such information furnished under subclause (A);

(4) provide for making the application and all pertinent documents related to such application available to parents,

guardians, and other members of the general public, and provide that all evaluations and reports required under clause (3) shall be public information;

(5) provide assurances that the local educational agency or intermediate educational unit will establish, or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate revise, its provisions periodically, but not less than annually;

(6) provide satisfactory assurance that policies and programs established and administered by the local educational agency or intermediate educational unit shall be consistent with the provisions of paragraph (1) through paragraph (7) of section 1412 and section 1413(a) of this title; and

(7) provide satisfactory assurance that the local educational agency or intermediate educational unit will establish and maintain procedural safeguards in accordance with the provisions of sections 1412(5)(B), 1412(5)(C), and 1415 of this title.

Approval by State educational agencies of applications submitted by local educational agencies or intermediate educational units; notice and hearing

(b)(1) A State educational agency shall approve any application submitted by a local educational agency or an in-

termediate educational unit under subsection (a) of this section if the State educational agency determines that such application meets the requirements of subsection (a) of this section, except that no such application may be approved until the State plan submitted by such State educational agency under subsection (a) of this section is approved by the Commissioner under section 1413(c) of this title. A State educational agency shall disapprove any application submitted by a local educational agency or an intermediate educational unit under subsection (a) of this section if the State educational agency determines that such application does not meet the requirements of subsection (a) of this section.

(2)(A) Whenever a State educational agency, after reasonable notice and opportunity for a hearing, finds that a local educational agency or an intermediate educational unit, in the administration of an application approved by the State educational agency under paragraph (1), has failed to comply with any requirement set forth in such application, the State educational agency, after giving appropriate notice to the local educational agency or the intermediate educational unit, shall --

(i) make no further payments to such local educational agency or such intermediate educational unit under section 1420 of this title until the State educational agency is satisfied that there is no longer any failure to comply with the requirement involved; or

(ii) take such finding into account

in its review of any application made by such local educational agency or such intermediate educational unit under subsection (a) of this section.

(B) The provisions of the last sentence of section 1416(a) of this title shall apply to any local educational agency or any intermediate educational unit receiving any notifications from a State educational agency under this paragraph.

(3) In carrying out its functions under paragraph (1), each State educational agency shall consider any decision made pursuant to a hearing held under section 1415 of this title which is adverse to the local educational agency or intermediate educational unit involved in such decision.

Consolidated applications

(c)(1) A State educational agency may, for purposes of the consideration and approval of applications under this section, require local educational agencies to submit a consolidated application for payments if such State educational agency determines that any individual application submitted by any such local educational agency will be disapproved because such local educational agency is ineligible to receive payments because of the application of section 1411(c)(4)(A)(i) of this title or such local educational agency would be unable to establish and maintain programs of sufficient size and scope to effectively meet the educational needs of handicapped children.

(2)(A) In any case in which a consolidated application of local educational agencies is approved by a State educational agency under paragraph (1), the payments which such local educational agencies may receive shall be equal to the sum of payments to which each such local educational agency would be entitled under section 1411(d) of this title if an individual application of any such local educational agency had been approved.

(B) The State educational agency shall prescribe rules and regulations with respect to consolidated applications submitted under this subsection which are consistent with the provisions of paragraph (1) through paragraph (7) of section 1412 and section 1413(a) of this title and which provide participating local educational agencies with joint responsibilities for implementing programs receiving payments under this subchapter.

(C) In any case in which an intermediate educational unit is required pursuant to State law to carry out the provisions of this subchapter, the joint responsibilities given to local educational agencies under subparagraph (B) shall not apply to the administration and disbursement of any payments received by such intermediate educational unit. Such responsibilities shall be carried out exclusively by such intermediate educational unit.

Special education and related services provided directly by State educational agencies; regional or State centers

(d) Whenever a State educational agency determines that a local educational agency --

(1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a) of this section;

(2) is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain such programs; or

(3) has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of such children;

the State educational agency shall use the payments which would have been available to such local educational agency to provide special educational and related services directly to handicapped children residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of this subchapter.

Reallocation of funds

(e) Whenever a State educational agency determines that a local educational agency is adequately providing a free ap-

propriate public education to all handicapped children residing in the area served by such agency with State and local funds otherwise available to such agency, the State educational agency may reallocate funds (or such portion of those funds as may not be required to provide such education and services) made available to such agency, pursuant to section 1411(d) of this title, to such other local educational agencies within the State as are not adequately providing special education and related services to all handicapped children residing in the areas served by such other local educational agencies.

Programs using State or local funds

(f) Notwithstanding the provisions of subsection (a)(2)(B)(ii) of this section, any local educational agency which is required to carry out any program for the education of handicapped children pursuant to a State law shall be entitled to receive payments under section 1411(d) of this title for use in carrying out such program, except that such payments may not be used to reduce the level of expenditures for such program made by such local educational agency from State or local funds below the level of such expenditures for the fiscal year prior to the fiscal year for which such local educational agency seeks such payments.

1415. Procedural safeguards

Establishment and maintenance

(a) Any State educational agency, any local educational agency, and any in-

termediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

Required procedures; hearing

(b)(1) The procedures required by this section shall include, but shall not be limited to --

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational ageny, or intermediate educational unit involved in the education or care of the child) to act as surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit --

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate education unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

Review of local decision by State educational agency

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate education unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

Enumeration of rights accorded parties to hearings

(d) Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses; (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

Civil action; jurisdiction

(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and

paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

1416. Withholding of payments; judicial review

(a) Whenever the Commissioner, after reasonable notice and opportunity for hearing to the State educational agency involved (and to any local educational agency or intermediate educational unit affected by any failure described in clause (2)), finds --

(1) that there has been a failure to comply substantially with any provision of section 1412 or section 1413 of this title, or

(2) that in the administration of the State plan there is a failure to comply with any provision of this subchapter or with any requirements set forth in the application of a local educational agency or intermediate educational unit approved by the State educational agency pursuant to the State plan,

the Commissioner (A) shall, after notifying the State educational agency, withhold any further payments to the State under this subchapter, and (B) may, after notifying the State educational agency, withhold further payments to the State under the Federal programs specified in section 1413(a)(2) of this title within his jurisdiction, to the extent that funds under such programs are available

for the provision of assistance for the education of handicapped children. If the Commissioner withholds further payments under clause (A) or clause (B) he may determine that such withholding will be limited to programs or projects under the State plan, or portions thereof, affected by the failure, or that the State educational agency shall not make further payments under this subchapter to specified local educational agencies or intermediate educational units affected by the failure. Until the Commissioner is satisfied that there is no longer any failure to comply with the provisions of this subchapter, as specified in clause (1) or clause (2), no further payments shall be made to the State under this subchapter or under the Federal programs specified in section 1413(a)(2) of this title within his jurisdiction to the extent that funds under such programs are available for the provision of assistance for the education of handicapped children, or payments by the State educational agency under this subchapter shall be limited to local educational agencies and intermediate educational units whose actions did not cause or were not involved in the failure, as the case may be. Any State educational agency, local educational agency, or intermediate educational unit in receipt of a notice pursuant to the first sentence of this subsection shall, by means of a public notice, take such measures as may be necessary to bring the pendency of an action pursuant to this subsection to the attention of the public within the jurisdiction of such agency or unit.

(b)(1) If any State is dissatisfied

with the Commissioner's final action with respect to its State plan submitted under section 1413 of this title, such State may, within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Commissioner. The Commissioner thereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of Title 28.

(2) The findings of fact by the Commissioner, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Commissioner to take further evidence, and the Commissioner may thereupon make new or modified findings of fact and may modify his previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(3) Upon the filing of such petition, the court shall have jurisdiction to affirm the action of the Commissioner or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

1417. Administration

Duties of Commissioner

(a)(1) In carrying out his duties under this subchapter, the Commissioner shall --

(A) cooperate with, and furnish all technical assistance necessary, directly or by grant or contract, to the States in matters relating to the education of handicapped children and the execution of the provisions of this subchapter;

(B) provide such short-term training programs and institutes as are necessary;

(C) disseminate information, and otherwise promote the education of all handicapped children within the States; and

(D) assure that each State shall, within one year after November 29, 1975, provide certification of the actual number of handicapped children receiving special education and related services in such State.

(2) As soon as practicable after November 29, 1975, the Commissioner shall, by regulation, prescribe a uniform financial report to be utilized by State educational agencies in submitting State plans under this subchapter in order to assure equity among the States.

Rules and regulations

(b) In carrying out the provisions of this subchapter, the Commissioner (and the Secretary, in carrying out the pro-

visions of subsection (c) of this section) shall issue, not later than January 1, 1977, amend, and revoke such rules and regulations as may be necessary. No other less formal method of implementing such provisions is authorized.

Protection of rights and privacy of parents and students

(c) The Secretary shall take appropriate action, in accordance with the provisions of section 1232g of this title, to assure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Commissioner and by State and local educational agencies pursuant to the provisions of ths subchapter.

Hiring of qualified personnel

(d) The Commissioner is authorized to hire qualified personnel necessary to conduct data collection and evaluation activities required by subsections (b), (c) and (d) of section 1418 of this title and to carry out his duties under subsection (a)(1) of this section without regard to the provisions of Title 5 relating to appointments in the competitive service and without regard to chapter 51 and subchapter III of chapter 53 of such title relating to classification and general schedule pay rates except that no more than twenty such personnel shall be employed at any time.

1418. Evaluation

Duty of Commissioner

(a) The Commissioner shall measure and evaluate the impact of the program authorized under this subchapter and the effectiveness of State efforts to assure the free appropriate public education of all handicapped children.

Studies and investigations

(b) The Commissioner shall conduct, directly or by grant or contract, such studies, investigations, and evaluations as are necessary to assure effective implementation of this subchapter. In carrying out his responsibilities under this section, the Commissioner shall --

(1) through the National Center for Education Statistics provide to the appropriate committees of each House of the Congress and to the general public at least annually, and shall update at least annually, programmatic information concerning programs and projects assisted under this subchapter and other Federal programs supporting the education of handicapped children, and such information from State and local educational agencies and other appropriate sources necessary for the implementation of this subchapter, including --

(A) the number of handicapped children in each State, within each disability, who require special education and related services;

(B) the number of handicapped children in each State, within each dis-

ability, receiving a free appropriate public education and the number of handicapped children who need and are not receiving a free appropriate public education in each such State;

(C) the number of handicapped children in each State, within each disability, who are participating in regular educational programs, consistent with the requirements of section 1412(5)(B) and section 1414(a)(1)(C)(iv) of this title, and the number of handicapped children who have been placed in separate classes or separate school facilities, or who have been otherwise removed from the regular eduation environment;

(D) the number of handicapped children who are enrolled in public or private institutions in each State and who are receiving a free appropriate public education, and the number of handicapped children who are in such institutions and who are not receiving a free appropriate public education;

(E) the amount of Federal, State, and local expenditures in each State specifically available for special education and related services; and

(F) the number of personnel, by disability category, employed in the education of handicapped children, and the estimated number of additional personnel needed to adequately carry out the policy established by this chapter; and

(2) provide for the evaluation of programs and projects assisted under this subchapter through --

(A) the development of effective methods and procedures for evaluation;

(B) the testing and validation of such evaluation methods and procedures; and

(C) conducting actual evaluation studies designed to test the effectiveness of such programs and projects.

Data sample

(c) In developing and furnishing information under subclause (E) of clause (1) of subsection (b) of this section, the Commissioner may base such information upon a sampling of data available from State agencies, including the State educational agencies, and local educational agencies.

Annual reports to congressional committees

(d)(1) Not later than one hundred twenty days after the close of each fiscal year, the Commissioner shall transmit to the appropriate committees of each House of the Congress a report on the progress being made toward the provision of free appropriate public education to all handicapped children, including a detailed description of all evaluation activities conducted under subsection (b) of this section.

(2) The Commissioner shall include in each such report --

(A) an analysis and evaluation of the effectiveness of procedures under-

taken by each State educational agency, local educational agency, and intermediate educational unit to assure that handicapped children receive special education and related services in the least restrictive environment commensurate with their needs and to improve programs of instruction for handicapped children in day or residential facilities;

(B) any recommendations for change in the provisions of this subchapter, or any other Federal law providing support for the education of handicapped children; and

(C) any evaluation of the effectiveness of the procedures undertaken by each such agency or unit to prevent erroneous classification of children as eligible to be counted under section 1411 of this title, including actions undertaken by the Commissioner to carry out provisions of this chapter relating to such erroneous classification.

In order to carry out such analyses and evaluations, the Commissioner shall conduct a statistically valid survey for assessing the effectiveness of individualized educational programs.

Authorization of appropriations

(e) There are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the provisions of this section.

1419. Incentive grants

Authority to make grants

(a) The Commissioner shall make a grant to any State which --

(1) has met the eligibility requirements of section 1412 of this title;

(2) has a State plan approved under section 1413 of this title; and

(3) provides special education and related services to handicapped children aged three to five, inclusive, who are counted for the purposes of section 1411 (a)(1)(A) of this title.

The maximum amount of the grant for each fiscal year which a State may receive under this section shall be $300 for each such child in that State.

Application

(b) Each State which --

(1) has met the eligibility requirements of section 1412 of this title,

(2) has a State plan approved under section 1413 of this title, and

(3) desires to receive a grant under this section,

shall make an application to the Commissioner at such time, in such manner, and containing or accompanied by such information, as the Commissioner may reasonably require.

Payment

(c) The Commissioner shall pay to each State having an application approved under subsection (b) of this section the amount to which the State is entitled under this section, which amount shall be used for the purpose of providing the services specified in clause (3) of subsection (a) of this section.

Ratable reduction or increase of payments

(d) If the sums appropriated for any fiscal year for making payments to States under this section are not sufficient to pay in full the maximum amounts which all States may receive under this subchapter for such fiscal year, the maximum amounts which all States may receive under this subchapter for such fiscal year shall be ratably reduced. In case additional funds become available for making such payments for any fiscal year during which the preceding sentence is applicable, such reduced amounts shall be increased on the same basis as they were reduced.

Authorization of appropriations

(e) In addition to the sums necessary to pay the entitlements under section 1411 of this title, there are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the provisions of this section.

1420. Payments

(a) The Commissioner shall make

payments to each State in amounts which the State educational agency of such State is eligible to receive under this subchapter. Any State educational agency receiving payments under this subsection shall distribute payments to the local educational agencies and intermediate educational units of such State in amounts which such agencies and units are eligible to receive under this subchapter after the State educational agency has approved applications of such agencies or units for payments in accordance with section 1414(b) of this title.

(b) Payments under this subchapter may be made in advance or by way of reimbursement and in such installments as the Commissioner may determine necessary.

* * *

Education of the Handicapped Regulations
ASSISTANCE TO STATES FOR EDUCATION OF HANDICAPPED CHILDREN (45 Code of Federal Regulations Part 121a)

Subpart A - General

PURPOSE, APPLICABILITY, AND GENERAL PROVISIONS REGULATIONS

Reg. 121a.1 Purpose.

The purpose of this part is:

(a) To insure that all handicapped children have available to them a free appropriate public education which includes special education and related services to meet their unique needs.

(b) To insure that the rights of handicapped children and their parents are protected.

(c) To assist States and localities to provide for the education of all handicapped children, and

(d) To assess and insure the effectiveness of efforts to educate those children.

Reg. 121a.2 Applicability to State, local, and private agencies.

(a) States. This part applies to each State which receives payments under Part B of the Education of the Handicapped Act.

(b) Public agencies within the State. The annual program plan is submitted by the State educational agency

on behalf of the State as a whole. Therefore, the provisions of this part apply to all political subdivisions of the State that are involved in the education of handicapped children. These would include: (1) The State educational agency, (2) local educational agencies and intermediate educational units, (3) other State agencies and schools (such as Departments of Mental Health and Welfare and State schools for the deaf or blind), and (4) State correctional facilities.

(c) Private schools and facilities. Each public agency in the State is responsible for insuring that the rights and protections under this part are given to children referred to or placed in private schools and facilities by that public agency.

Reg. 121a.3 General provisions regulations.

Assistance under Part B of the Act is subject to Parts 100, 100b, and 121 of this chapter, which include definitions and requirements relating to fiscal, administrative, property management, and other matters.

Reg. 121a.4 Free appropriate public education.

As used in this part, the term "free appropriate public education" means special education and related services which:

(a) Are provided at public expense, under public supervision and direction, and without charge.

(b) Meet the standards of the State educational agency, including the requirements of this part.

(c) Include preschool, elementary school, or secondary school education in the State involved, and

(d) Are provided in conformity with an individualized education program which meets the requirements under Sections 121a.340-121a.349 of Subpart C.

Reg. 121a.5 Handicapped children.

(a) As used in this part, the term "handicapped children" means those children evaluated in accordance with Sections 121a.530-121a.534 as being mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, deaf-blind, multi-handicapped, or as having specific learning disabilities, who because of those impairments need special education and related services.

(b) The terms used in this definition are defined as follows:

(1) "Deaf" means a hearing impairment which is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, which adversely affects educational performance.

(2) "Deaf-blind" means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational problems that they cannot be accomodated in special education programs solely for deaf or blind children.

(3) "Hard of Hearing" means a hearing impairment, whether permanent or fluctuating, which adversely affects a child's educational performance but which is not included under the definition of "deaf" in this section.

(4) "Mentally retarded" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, which adversely affects a child's educational performance.

(5) "Multihandicapped" means concomitant impairments (such as mentally retarded-blind, mentally retarded-orthopedically impaired, etc.), the combination of which causes such severe educational problems that they cannot be accommodated in special education programs solely for one of the impairments. The term does not include deaf-blind children.

(6) "Orthopedically impaired" means a severe orthopedic impairement which adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly (e.g., clubfoot, absence of some member, etc.), impairments caused by disease (e.g., poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns which cause contractures).

(7) "Other health impaired" means limited strength, vitality or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes,

which adversely affects a child's educational performance.

(8) "Seriously emotionally disturbed" is defined as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, which adversely affects educational performance:

(A) An inability to learn which cannot be explained by intellectual, sensory, or health factors;

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(C) Inappropriate types of behavior or feelings under normal circumstances;

(D) A general pervasive mood of unhappiness or depression; or

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) The term includes children who are schizophrenic or autistic. The term does not include children who are socially maladjusted, unless it is determined that they are seriously emotionally disturbed.

(9) "Specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual handicaps, brain injury, minimal brain disfunction, dyslexia, and developmental aphasia. The term does not include

children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or ecomonic disadvantage.

(10) "Speech impaired" means a communication disorder such as stuttering, impaired articulation, a language impairment, or a voice impairment, which adversely affects a child's educational performance.

(11) "Visually handicapped" means a visual impairment which, even with correction, adversely affects a child's educational performance. The term includes both partially seeing and blind children.

Reg. 121a.6 Include.

As used in this part, the term "include" means that the items named are not all of the possible items that are covered, whether like or unlike the ones named.

Reg. 121a.7 Intermediate educational unit.

As used in this part, the term "intermediate educational unit" means any public authority, other than a local educational agency, which:

(a) Is under the general supervision of a State educational agency;

(b) Is established by State law for the purpose of providing free public education on a regional basis; and

(c) Provides special education and related services to handicapped children within that State.

Reg. 121a.8 Local educational agency.

(a) As used in this part, the term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(b) For the purposes of this part, the term "local educational agency" also includes intermediate educational units.

Reg. 121a.9 Native language.

As used in this part the term "native language" has the meaning given that term by section 703(a)(2) of the Bilingual Education Act, which provides as follows:

The term "native language", when used with reference to a person of limited English-speaking ability, means the language normally used by that person, or in the case of a child, the language normally used by the parents of the child.

Reg. 121a. 10 Parent.

As used in this part, the term "parent" means a parent, guardian, a person acting as a parent of a child, or a surrogate parent who has been appointed in accordance with Section 121a.514. The term does not include the State if the child is a ward of the State.

Reg. 121a.11 Public agency.

As used in this part, the term "public agency" includes the State educational agency, local educational agencies, intermediate educational units, and any other political subdivisions of the State which are responsible for providing education to handicapped children.

Reg. 121a.12 Qualified.

As used in this part, the term "qualified" means that a person has met State educational agency approved or recognized certification, licensing, registration, or other comparable requirements which apply to the area in which he or she is providing special education or related services.

Reg. 121a.13 Related services.

(a) As used in this part, the term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disa-

bilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

(b) The terms used in this definition are defined as follows:

(1) "Audiology" includes:

(i) Identification of children with hearing loss;

(ii) Determination of the range,nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing;

(iii)Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lip-reading), hearing evaluation, and speech conservation;

(iv) Creation and administration of programs for prevention of hearing loss;

(v) Counseling and guidance of pupils, parents, and teachers regarding hearing loss; and

(vi) Determination of the child's need for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

(2) "Counseling services" means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

(3) "Early identification" means the implementation of a formal plan for identifying a disability as early as possible in a child's life.

(4) "Medical services" means services provided by a licensed physician

to determine a child's medically related handicapping condition which results in the child's need for special education and related services.

(5) "Occupational therapy" includes:

(i) Improving, developing or restoring functions impaired or lost through illness, injury, or deprivation;

(ii) Improving ability to perform tasks for independent functioning when functions are impaired or lost; and

(iii) Preventing, through early intervention, initial or further impairment or loss of function.

(6) "Parent counseling and training" means assisting parents in understanding the special needs of their child and providing parents with information about child development.

(7) "Physical therapy" means services provided by a qualified physical therapist.

(8) "Psychological services" include:

(i) Administering psychological and educational tests, and other assessment procedures;

(ii) Interpreting assessment results;

(iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning.

(iv) Consulting with other staff members in planning school programs to meet the special needs of children as indicated by psychological tests, interviews, and behavioral evaluations; and

(v) Planning and managing a program of psychological services, including psychological counseling for child-

ren and parents.

(9) "Recreation" includes:

(i) Assessment of leisure function;

(ii) Therapeutic recreation services;

(iii) Recreation programs in schools and community agencies; and

(iv) Leisure education.

(10) "School health services" means services provided by a qualified school nurse or other qualified person.

(11) "Social work services in schools" include:

(i) Preparing a social or developmental history on a handicapped child;

(ii) Group and individual counseling with the child and family;

(iii) Working with those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school; and

(iv) Mobilizing school and community resources to enable the child to receive maximum benefit from his or her educational program.

(12) "Speech pathology" includes:

(i) Identification of children with speech or language disorders;

(ii) Diagnosis and appraisal of specific speech or language disorders;

(iii) Referral for medical or other professional attention necessary for the habilitation of speech or language disorders;

(iv) Provisions of speech and language services for the habilitation or prevention of communicative disorders; and

(v) Counseling and guidance of parents, children, and teachers regarding speech and language disorders.

(13) "Transportation" includes:

(i) Travel to and from school and between schools,

(ii) Travel in and around school buildings, and

(iii) Specialized equipement (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a handicapped child.

Reg. 121a.14 Special education.

(a)(1) As used in this part, the term "special education" means specially designed instruction, at no cost to the parent, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(2) The term includes speech pathology, or any other related service, if the service consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child, and is considered "special education" rather than a "related service" under State standards.

(3) The term also includes vocational education if it consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child.

(b) The terms in this definition are defined as follows:

(1) "At no cost" means that all specially designed instruction is provided without charge, but does not preclude incidental fees which are normally charged to nonhandicapped students or their parents as a part of the regular

education program.

(2) "Physical education" is defined as follows:

(i) The term means the development of:

(A) Physical and motor fitness;

(B) Fundamental motor skills and patterns; and

(C) Skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports).

(ii) The term includes special physical education, adapted physical education, movement education, and motor development.

(3) "Vocational education" means organized educational programs which are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career requiring other than a baccalaureate or advanced degree.

Reg. 121a.15 State.

As used in this part, the term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

Subpart B - State Annual Program Plans and Local Applications

ANNUAL PROGRAM PLANS - GENERAL

Reg. 121a.110 Condition of assistance.

In order to receive funds under

Part B of the Act for any fiscal year, a State must submit an annual program plan to the Commissioner through its State educational agency.

Reg. 121a.111 Contents of plan.

Each annual program plan must contain the provisions required in this subpart.

Reg. 121a.112 Certification by the State educational agency and attorney general.

Each annual program plan must include:

(a) A certification by the officer of the State educational agency authorized to submit the plan that:

(1) The plan has been adopted by the State educational agency, and

(2) The plan is the basis for the operation and administration of the activities to be carried out in that State under Part B of the Act; and

(b) A certification by the State Attorney General or other authorized State legal officer that:

(1) The State educational agency has authority under State law to submit the plan and to administer or to supervise the administration of the plan, and

(2) All plan provisions are consistent with State law.

Reg. 121a.113 Approval; disapproval.

(a) The Commissioner shall approve any annual program plan which meets the requirements of this part and SubpartB of Part 100b of this chapter.

(b) The Commissioner shall disapprove any annual program plan which does not meet those requirements but may not finally disapprove a plan before giving reasonable notice and an opportunity for a hearing to the State educational agency.

(c) The Commissioner shall use the procedures set forth in Sections 121a.580-121a.583 of Subpart E for a hearing under this section.

Reg. 121a.114 Effective period of annual program plan.

(a) Each annual program plan is effective for a period from the date it becomes effective under Section 100b.35 of this chapter through the following June 30.

(b) The Commissioner may extend the effective period of an annual program plan, on the request of a State, if the plan meets the requirements of this part and Part B of the Act.

ANNUAL PROGRAM PLANS - CONTENTS

Reg. 121a.120 Public participation.

(a) Each annual program plan must include procedures which insure that the requirements in Sections 121a.280-121a.284 are met.

(b) Each annual program must also include the following:

(1) A statement describing the methods used by the State educational agency to provide notice of the public hearings on the annual program plan. The statement must include:

(i) A copy of each news release and advertisement used to provide notice.

(ii) A list of the newspapers and other media in which the State educational agency announced or published the notice, and

(iii)The dates on which the notice was published.

(2) A list of the dates and locations of the public hearings on the annual program plan.

(3) A summary of comments received by the State educational agency and a description of the modifications that the State educational agency has made in the annual program plan as a result of the comments.

(4) A statement describing the methods by which the annual program plan will be made public after its approval by the Commissioner. This statement must include the information required under paragraph (b)(1) of this section.

Reg. 121a.121 Right to a free appropriate public education.

(a) Each annual program plan must include information which shows that the State has in effect a policy which insures that all handicapped children have the right to a free appropriate public education within the age ranges and timelines under Section 121a.122.

(b) The information must include a copy of each State statute, court order, State Attorney General opinion, and other State document that shows the source of the policy.

(c) The information must show that

the policy:

(1) Applies to all public agencies in the State;

(2) Applies to all handicapped children;

(3) Implements the priorities established under Section 121a.127(a)(1) of this subpart; and

(4) Establishes timeliness for implementing the policy, in accordance with Section 121a.122.

Reg. 121a.122 Timelines and ages for free appropriate public education.

(a) General. Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken in order to insure that a free appropriate education is available for all handicapped children aged three through eighteen within the State not later than September 1, 1978, and for all handicapped children aged three through twenty-one within the State not later than September 1, 1980.

(b) Documents relating to timeliness. Each annual program plan must include a copy of each statute, court order, attorney general decision, and other State document which demonstrates that the State has established timelines in accordance with paragraph (a) of this section.

(c) Exception. The requirement in paragraph (a) of this section does not apply to a State with respect to handicapped children aged three, four, five, eighteen, nineteen, twenty, or twenty-one to the extent that the requirement would be inconsistent with State law or

practice, or the order of any court, respecting public education for one or more of those age groups in the State.

(d) Documents relating to exceptions. Each annual program plan must:

(1) Describe in detail the extent to which the exception in paragraph (c) of this section applies to the State; and

(2) Include a copy of each State law, court order, and other document which provides a basis for the exception.

Reg. 121a.123 Full educational opportunity goal.

Each annual program plan must include in detail the policies and procedures which the State will undertake, or has undertaken, in order to insure that the State has a goal of providing full educational opportunity to all handicapped children aged birth through twenty-one.

* * *

Reg. 121a.550 General.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of Sections 121a.550-121a.556.

(b) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and

(2) That special classes, separate

schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Reg. 121a.551 Continuum of alternative placements.

(a) Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services.

(b) The continuum required under paragraph (a) of this section must:

(1) Include the alternative placements listed in the definition of special education under Sectin 121a.13 of Subpart A (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions), and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

REGULATIONS OF THE NEW YORK STATE
COMMISSIONER OF EDUCATION

8 N.Y.C.R.R. 200.4(d)(4)
(Revised as of 1979)

(4) Resource programs for hearing impaired. Hearing impaired pupils shall be provided daily instructional programs.
  (i) Individual service shall be provided by a certified teacher of the speech and hearing handicapped for hard of hearing children for a minimum of 30 minutes a day, 5 days per week.
  (ii) Individual service by a certified teacher of the deaf shall be provided to deaf pupils for a minimum of 1 hour, 5 days per week.

8 N.Y.C.R.R. 200.4(e)(4)
(Revised as of 1980)

(4) Resource room programs for hearing impaired. Hearing impaired pupils shall be provided daily instructional programs.
  (i) Individual service shall be provided for hard of hearing pupils for a minimum of 30 minutes a day, five days per week.
  (ii) Individual service shall be provided to deaf pupils for a minimum of one hour, five days per week.

Office - Supreme Court, U.S.
FILED
DEC 21 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1002

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Petitioners,

—against—

AMY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY in their own right,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 15, 1980

PETITION FOR CERTIORARI GRANTED NOVEMBER 2, 1981

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DOCKET ENTRIES-UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK - 79 Civ. 2139

4-24-79 1. Fld complaint. Issued summons.

5-15-79 2. Filed Summs with Marshal's return: Board of Education of the Hedrick Huson Central C.V. Eible 5-8-79

5-31-79 3. Filed Pltffs' request for a hearing re: additional evidence.

5-31-79 4. Filed Pltffs' amendedment to complt.

5-31-79 5. Filed Pltffs' combined interrogs and reques for production of documents.

7-3-79 6. Filed pltffs affirmation & ex parte motion for an order purs to Rule 6(d) providing that the motion of the deft dtd 6-18-79 shall

be submitted on Friday June 29, 1979

7-3-79 7. Filed mrmoradum of alw on behlaf of pltff

7-3-79 8. Filed pltffs affirmation in opposition to defts motion to dismiss

7-3-79 9. Filed DEft Hendrick Hudson School District affirmation & notice of motion purs to Local Rule 9(b) & Gen Rule 12 (B) to dismiss for lack of jurisdiction

7-3-79 10. Filed memorandum of law on behalf of defts

7-5-79 11. Filed defts answers to -nterrog's

7-13-79 12. Filed Pltffs; affdvt & Notice of motion for an order compelling party to

answer inter and the imposition of sanctions for failure to provide inspection of documents. Ret: 7-20-79.

7-31-79 13. Filed Pltff's reply affirmation by Michael A. Chatoff/

7-31-79 14. Filed Deft's affirmation in response to motion to compel answers to interrogs.

7-31-79 15. Filed duplicate original of Memorandum & Order of Magistrate Re: Pltff's motion is Accordingly denied in all respects. So Order Raby, Magistrate.

8-15-79 16. Filed pltff's notice of motion for an order for a

prel. inj. REt: 8-17-79.

8-15-79 17. Filed Pltfs' memo of law in support motion for a prel. inj.

8-23-79 18. Filed Order that the deft's motion to dismiss is denied..So Ordered Broderick, J.m/.n pltff to file an amended complaint within 10 days

8-24-79 19. Filed Plntffs' interrogs.

9-4-79 20. Fld Deft's Affidavit in opposition to pltff's Motion for prel. ing

9-4-79 21. Fld Deft's Memorandum in opposition to pltff;s Motion

9-4-79 22. Fld pltffs affirmation re responsibility for any detriment to pltffs

education.

9-5-79 23. Fld pltffs AMENDED COMPLAINT.

9-6-79 24. Filed Pltff's affdvt of service of papers indicated...on the defts on 9-4-79.

9-25-79 25. Fld The Video Taped deposition of McCay Vernon taken on 9-19-79

9-26-79 26. Fld Pltff's Notice of aking depoition of McCay Ernon

9-26-79 ---Hearing held on motion for prel. inj. before Judge Broderick.

9-27-79 ---Hearing cont'd.

9-28-79 ---Hearing cont'd.

10-4-79 ---Hearing cont'd and concluded. It is Stipulated between parties that the

hearing on prel. inj. will tkae the place of a trial. "Decision Reserved." All briefs due on 10-19-79. Reply briefs by 10-24-79.

10-5-79 27. Filed ANSWER of Deft. Ambach.

10-5-79 28. Filed ANSWER of deft. Bd. of Educa. of the H. Hudson Cntrl School District.

10-23-79 29. Filed Memorandum on behalf of deft. Gordon M. Ambach.

10-23-79 30. Filed Brief on behalf of deft. School District.

11-8-79 31. Filed Pltff's reply brief.

11-13-79 32. Filed Pltff's notice to take deposition of McCay Vernon on 9-19-79.

11-15-79 33. Filed request to clerk for entry of default.

1-2-79 34. Filed Order/ Accordingly, the deicsion of the Commisioner of Ed. dtd 4-10-79, is reversed and it is hereby ordered that the defts provide the pltff with service of a certified interpreter for te deaf during any school period in which academi subjects are taught. Broderick, J.m/n Judgment entered 1-21-80. Clerk mn

1-16-80 35. Filed Deft. Hendrick Hudson's Amended answer.

1-16-80 36. Filed deft. Board of Ed's response to interrogs.

1-16-80 37. Filed Pltff's proposed findings of fact.

1-16-80 38. Filed deft. Board of Ed's trial memorandum on motion for prel.inj.

1-1780 39. Filed Memorandum Order=For the reasons which follow, I deny the deft. Commissioner's motion and grant the pltff's motion...So Ordered Broderick, Jm/n

1-17-80 40. Fld Opinion #49563.....etc.....Fot the reasons which follow, I find that the pltffs have established by a preponderence of the evidence Amy's right toa sign Language interpreter in the classroom....etc..... Broderick, J.mn

1-25-80 41. Filed NOtice of appeal

to the U.S.C.A. by the defts from theorders entered on 1-2-80 and 1-17-80. m/n to Michael A. Chatoff.

1-25-80 42. Filed Undertaking on appeal bond in the asum of $250.00 by the Aetna Casualty and Surety Co.

1-25-80 43. Filed Transcript information form D - Transcript being ordered.

2-13-80 44. Filed Pltff's O.S.C. for an order appointing Robert Manley to retain a certified interpreter for the deaf who will interpret for Amy Rowley...ret: 2-13-80 Broderick, J.

2-14-80 45. Filed Order that defts' cross motion for a stay pending appeal of this

court's order of 12-28-79 are herebydenied...Broderick J.m/n.

2-21-80 46. Filed Notice to the docket clerk that the original record on appeal is certified and transmitted to the U.S.C.A.

2-27-80 47. Filed true copy of order form the U.S.C.A. that the motion made by the appellant dtd 2-15-80 for a stay pending appeal is granted.

3-17-80 48. Filed transcript of record of proceedings dsated, 9-26,27,28 & 10-5-79.

3-17-80 49. Filed notice to the docket clerk that the 1st supplemental record has been

certified and transmitted to the U.S.C.A.

3-18-80 50. Filed Certification re: documents that are part of record of appeal to the U.S.C.A....Broderick, J.

3-31-80 51. Filed deft's designation of exhibits to USCA.

3-31-80 52. Filed Notice to the docket clerk that the 1st supplemental record has been certified and transmitted to the U.S.C.A.

4-24-80 53. Filed pltff's cross-designation of exhibits to be included as part of the record on appeal.

4-24-80 54. Fld Notice to the Clker that the 3rd supplemental

record on appeal has been Certified & transmitt to the 3rd supplemental record on appeal

9-16-80 55. Filed true copy of order from the U.S.C.A. that the motion by the appellees to vacate stay dtd 2-19-80..is hereby granted. m/n

9-17-80 56. Filed pltffs' OSC for an order appointing R. Manley to retain a certified interpreter for the deaf...ret: 9-22-80...Broderick, J.

9-24-80 57. Filed deft. Hendrick's affirmation in opposition to the O.S.C.

9-24-80 58. Filed deft. Hendrick's affirmation in opposition to

	the O.S.C.
9-25-80	59. Filed Order that pltff's motion to appoint Mr. Maley as interpreter for the deaf. is denied...w/out prej..So Ordered Broderick,J.m/n
10-1-80	60. Filed true copy of order from the U.S.C.A. that the judgment of the District Court is affirmed in accordance with the opinion of this court..Judgment entered 10-1-80..Clerkmn/Docketed as Judgment#81,0080 on 1-26-81
1-5-81	61. 9-22-80
1-26-81	62. Fld Memo-end on the Bottom of a letter to Judge Broderick from Kuntz & Spetzer dtd

	1-21-81...Application granted. The return date for the OSC is adjourned to 2-13-81 at 2:30 pm..etc....so Ordered....Broderick, J.mn
1-30-81	63. Fld Pltff's OSC for an order directing defts, school district to provide a sign language interpreter...ret: 1-23-81...Broderick, J.
2-17-81	---Fld memo-end of on the back of document #63.....Withdrawn on consnt after conference...Braderick, J.mn

DOCKET ENTRIES-UNITED STATES COURT OF APPEALS FOR SECOND CIRCUIT: 80-7098

1-31-80	Copies of district court docket entries and notice of appeal on behalf of The Bd. of Ed. Hendrick Hudson & ano. filed
1-31-80	Copy of receipt for payment of docket fee filed
1-31-80	Form C on behalf of The Bd. of Education etc. ental. filed
1-31-80	Form D on behalf of The Bd. of Education etc. et.al. filed
1-31-80	Court Reporter copy of form D filed
2-4-80	Scheduling order No. 1 filed, PC, CAMP
2-15-80	Appellant Board of Education of Hendrick Hudson motion

for stay, pfs filed

2-19-80 Appellee Rowley affidavit in opposition to motion for stay, pfs filed

2-19-80 Appellee Rowley memorandum of law in opposition to motion for stay, pfs filed

2-19-80 Order granting Stay filed

2-19-80 Certified copy of order granting stay issued to dist. court

2-21-80 Record on appeal filed (original papers of district court)

2-28-80 Appellant Bd of Ed. Hendrick Hudson motion for extension of time to file brief and appendix, pfs. filed (Order endorsed: 2-29-80 granted)

3-3-80 Appellees Rowley affirmation in opposition to motion for

ext. time pfs. filed

3-6-80 Appellee Rowley motion for reconsideration and vacation of extension of time, order for expedited appeal and imposition of sanctions pfs. filed (Order endorsed;3-12-80 DENIED)

3-12-80 Appellants Hendrick Hudson etc. affirmation in opposition to motion for reconsideration of order extending time etc. pfs. filed

3-18-80 First supplemental record on appeal filed (original papers of D.C.)

3-19-80 Order that court's order of 3-12-80 with respect to appellee's motion of 3-17-80 is amended by adding

that motion of 3-16-80 is otherwise denied. filed

3-24-80 Appellant Commissioner Bd. of Ed. brief filed, pfs

3-24-80 Appellant Hendrick Hudson central School Dist. brief filed, pfs

3-24-80 Appellants The Bds. of Ed., etc. appendix filed, pfs

3-24-80 Appellants The Bd. of Ed., etc. transcript vol. viled, pfs (4cc)

3-24-80 Appellants The Bd. of Ed., etc. exhibits vol. filed, pfs (4cc)

3-24-80 Amicus brief NYS School Boards Asson. filed (by consent) in support of appellants Hendrick Hudson, etc.

3-31-80 Second supplemental record

on appeal filed

4-21-80 Appellee Rowley brief, pfs. filed

4-21-80 National Assoc. of the Deaf amicus brief in support of appellee Rowley, by consent, pfs, filed

4-24-80 Appellees Rowley motion for permission to transcribe oral argument by tape-recording, pfs, filed (Order endorsed:4-28-80 granted) WRM

4-28-80 Appellants Hendrick Hudson reply brief, pfs. filed

4-28-80 Third Supplemental record filed (original papers of dist, court)

4-30-80 Order granting leave to file a reply brief on behalf of NYS School Bd. Assn. as

	amicus curiae filed (WRM)
4-30-80	Reply brief on behalf of NYS Schoold Bd Asson. as amicus curiae filed
5-1-80	Case argued before: Mansfield, Timbers, CJJ, Bonsal, DJ
7-17-80	Judgment affirmed, published opinion, Per Curiam
7-17-80	Dissenting, published opinion, Mansfield
7-17-80	Judgment filed
7-17-80	Transcript of oral argument of 5-1-80 filed
7-24-80	Appellee Rowley itemized and verified bill of costs filed, pfs.
7-31-80	Appellants Hendrick Hudson & ano. petition for rehearing, pfs. filed
7-31-80	Appellants Hendrick Hudson &

ano. petition for rehearing en banc pfs. filed

8-14-80 Appellee Rowley motion to vacate stay granted 2-19-80, pfs. filed

8-21-80 Appellants Hendrick Hudson answering affirmation in opposition to motion to vacate the stay, pfs. filed

9-4-80 Order granting vacation of stay of this court dated 2-19-80 filed (WRM, WHM, Cjj, Bonsal, DJ)

9-8-80 Certified copy of order vacating stay issued to district court

9-17-80 Order denying petition for rehearing filed

9-17-80 Order denying petition for rehearing en banc filed.

9-24-80 Mandate issued (opinion and

judgment)

10-1-80 Mandate receipt received

10-24-80 Certified copy of statement of cost issued to district court under covering letter

12-9-80 DUPLICATE MANDATE issued (Judgment)

12-29-80 Notice of filing petition for certiorari with supreme court filed (SC#80-1002)

1-24-81 Record on appeal, first second and third supplemental records returned to district court.

3-19-81 Receipt of return of records filed.

TRANSCRIPT OF HEARING BEFORE
THE IMPARTIAL HEARING OFFICER
DECEMBER 20, 1978

----------X

In the Matter of

AMY ROWLEY

----------X

Hendrick Hudson School District
61 Trolley Road
Montrose, New York
December 20, 1978
10:45 a.m.

BEFORE: ALBERT P. ROBERTS, Hearing Officer

APPEARANCES: KUNTZ, LEWIS & SPLETZER, P.C.
Attorneys for the School District
21 Davis Avenue
Box 3330
Poughkeepsie, New York 12603
BY: RAYMOND G. KUNTZ, ESQ.

MICHAEL A. CHATOFF, ESQ.
Attorney for the Petitioner
192-05 Radnor Road
Jamaica, New York 11423

ALSO PRESENT: ANITA POLK, Interpreter
27 Lenox Avenue
White Plains, New York

MARY SHEIE, Interpreter

JAMES RAUKOHL

Maureen M. McCaffery, R.P.R.

MICHAEL CHATOFF-INTRODUCTORY REMARKS[6]

MR. CHATOFF: There are two matters that will be considered at this hearing. First, Mr. and Mrs. Rowley have requested an independent educational evaluation. According to the regulations of the commissioner, that evaluation must be at District expense unless the hearing examiner determines that the recommendation of the Committee on the Handicapped is appropriate.

Secondly, the more substantive issue, the hearing examiner must determine whether the recommendation of the Committee on the Handicapped is correct.

The evidence and my closing statement will show that the Committee on the Handicapped applied an inappropriate standard in its determination of the proper services

to be provided for Amy Rowley; that the Committee on the Handicapped misrepresented, misinterpreted the regulations of the Commissioner of Education and that the Committee defaulted in its obligations under a very important section of those regulations.

THE INTERPRETER: Does she just say yes?

MR. ROBERTS: I didn't understand that.

THE INTERPRETER: Yes, she promises to tell the truth.

MR. ROBERTS: Proceed, Mr. Chatoff.

DIRECT EXAMINATION

BY MR. CHATOFF:

Q First I want to know what Mrs. Rowley's profession is?

A My profession is a certified teacher of the deaf, National Certification of the American Director of the Deaf.

[18]

Q Is Amy Rowley your daughter?

A Yes, she is my daughter.

Q She is deaf, is she not?

A Yes, she's deaf.

Q When you discovered that she was deaf, too, how did you begin training her?

A I use the total communication approach.

Q Why do you favor total communication?

A Because I am deaf myself, and I have used that in my profession.

Q Are you a good lip reader?

MR. KUNTZ: I object to that question.

A I would say yes.

MR. ROBERTS: What is the nature of your objection?

MR. KUNTZ: I don't know what relevancy, whether Mrs. Rowley is a good lip reader, has to this hearing.

MR. CHATOFF: I will get to that right now.

MR. KUNTZ: I withdraw the objection.

Q At this hearing, can you, Mrs. Rowley, understand what is going on by looking at the people

[19]

who are talking or must you follow the interpreter who is using total communication?

A I must follow the interpreter using total communication.

Q I think it's important to forget about individual questions. Explain to us why you want Amy to be taught in the total communication method.

A So that she will be able to get the equal opportunity like hearing people.

Q I would like you to read part of the affidavit of Taras Denis,

from the second paragraph.

MR. KUNTZ: I'd object. I think the affidavit speaks for itself. I don't know why Mrs. Rowley has to read it.

MR. ROBERTS: I have to sustain that.

Q First we will establish the basis. Do you know Taras Denis?

A Yes, I know him.

Q How long have you known Taras Denis?

A Fourteen years.

Q Does he know Amy?

A Yes, he knows Amy.

Q Have you discussed Amy's education with Taras?

A Yes.

Q Was he present at the Committee on the Handicapped meeting on September 12th?

A Yes.

MR. CHATOFF: Is there now a basis for reading Mr. Denis's affidavit into the record? It will appear as part of the record under any circumstances. Would it be appropriate to have Mrs. Rowley read it?

MR. ROBERTS: Are you addressing the question to me, Mr. Chatoff?

MR. KUNTZ: I withdraw my objection. If he wants to have her read it, he may proceed.

MR. ROBERTS: It's already in evidence.

A "It now appears that the Hendrick Hudson School board is taking an adversary position by refusing to assist Mr. and Mrs. Rowley in the overall development of their deaf

child, despite the demonstrated cooperation of the parents and the unanimous support of authorities familiar in the field. In effect, the school board is assuming a very grave risk -- including possible irreversible damage to both career and personality of a child as

[21]

bright as Amy -- in denying what is due her under Public Law 94-142".

MR. CHATOFF: I think that's all the questions I have. You may cross-examine.

MR. KUNTZ: I have no questions on cross-examination at this time.

(Whereupon, the witness was excused and withdrew.)

MR. CHATOFF: As my next witness, I would like to call Mr. Clifford Rowley.

CLIFFORD ROWLEY - TESTIMONY [22]

DIRECT EXAMINATION

BY MR. CHATOFF:

Q What is your profession?

THE INTERPRETER: I'm a research chemist.

Q Is Amy Rowley your daughter?

THE INTERPRETER: Yes.

Q When you discovered that she was deaf, how did you train her?

THE INTERPRETER: When I realized she had hearing problems, we used what we had learned by using a method called total communication, all lip reading, hearing, everything, that she be able to understand.

MR. CHATOFF: I think that is sufficient right now. Do you wish to cross?

MR. KUNTZ: I have no cross-examination, thank you.

MARY SHEIE - TESTIMONY [24]

DIRECT EXAMINATION

BY MR. CHATOFF:

Q What is your profession?

A My profession is I am a certified teacher of the deaf, certified interpreter for the deaf and a teacher of sign language.

Q Do you favor the use of total communication in the education of deaf children?

A Yes, I do.

Q Are you familiar with Doctor Robert R. Davila?

A Yes, I am.

Q Have you read any portion of the affidavit submitted by Doctor Davila in this case?

A Yes, I have.

Q Do you agree with the statement that, "The average person speaks one hundred twenty words a

minute. Of these, fifty percent are visible and of

[25]

these fifty percent, we can see only three fourths of the movement due to the rapidity of speech -- thirteen sound movements per second. The eyes can consciously see eight or nine or at best ten. Many speech sounds are obscure and barely visible. In general, fifty percent of all speech sounds are hidden". Do you agree with that?

MR. KUNTZ: I'd object to the question on the grounds that it calls for testimony by this witness which should stem from some foundation based upon her expertise rather than to comment upon information or testimony already produced in the record.

I have no objection to her testifying as to what she knows, but to have her comment upon some other form of testimony or affidavit leaves us in a very difficult position to ask her questions about her own views.

MR. ROBERTS: Sustained.

MR. CHATOFF: Do you wish additional documentation of the witness' experience?

MR. KUNTZ: No, I'd simply suggest that she be allowed to testify from her own knowledge and from the facts that she knows.

Q When a deaf child uses oralism only, lip [26] reading, can the deaf child understand everything that is spoken?

A Not everything, no.

Q In a situation where a deaf child does not understand everything

that is spoken, what are the options available to the child?

A The options available, when not everything is understood, are to be placed in a total communication situation which would include a person, interpreter or teacher who is capable of communicating as close to one hundred percent of the information as possible.

Q I had in mind something else. If a deaf child uses lip reading only and misunderstands or does not understand some or all of what is said, do deaf people, on occasion, say, "Yes, I understand," even when they don't understand?

A Yes, it has been my experience that with deaf people --

Q Or might a deaf child ask a person to repeat a statement that he

has not understood?

A It is more common for the deaf child to simply nod his head in agreement than to say that they do not understand.

Q If I can refer to just one additional [27]

statement in Doctor Davila's statement that, "The sensitive teacher may repeat what has been said for the deaf student which becomes frustrating for the rest of the class." Would you agree with that?

A Yes, I would.

Q If an interpreter were used for a deaf child, a deaf child who is familiar with total communication, would there be any need for the teacher to repeat for the child?

A Not as often.

MR. CHATOFF: I have no further questions. You may cross.

CROSS EXAMINATION

BY MR. KUNTZ:

Q Mrs. Sheie, have you observed Amy in the Furnace Woods School?

A No, I have not.

MR. KUNTZ: I have no further questions.

MARIANNE PAPPAS - TESTIMONY [140]

DIRECT EXAMINATION

BY MR. KUNTZ:

Q By whom are you employed?

A Hendrick Hudson School District.

Q In what capacity?

A Resource teacher, certified in special education.

Q Are you a member of the Committee on the Handicapped?

A Yes, I am.

Q As part of the committee's evaluation of the Amy Rowley matter, did you undertake certain activity on behalf of the committee?

A Yes.

Q What did you do?

A I observed Amy in the classroom for one morning.

Q Would you tell the hearing officer of

your observations and conclusions that you drew from those observations?

A Yes. I observed Amy in her first grade classroom functioning in a variety of situations; academic, social, working in large group, small group, working individually, working in highly structured format, working informally, where optimum performance was expected and where the child was to set her own goals.

The first activity I observed, the children were in a small group. It was a cut and color type of activity where they had to follow the directions of the teacher. Amy watched what the teacher did as well as what the teacher said.

The teacher at this point had the Earmark microphone on and Amy

was tuned in. When Amy had her back to the teacher and the teacher spoke to her, she would immediately turn around to watch the teacher again.

At the end of this activity she went to her desk to complete a work book page independently. She appeared very comfortable in this independent setting. She required no help to complete the page. In fact, she offered help to other children who could not complete the page independently.

[142]

I found that her interaction with other children while they were at their seats was absolutely beautiful. It was a real give and take atmosphere which you would like to find in a typical first grade classroom.

The third activity which I observed she was helping a boy put some puzzles together. She was very quick at finding the pieces. Her social interaction here was beautiful. She stuck to the task well. She watched the other child to see what he was saying and what he was doing. I would say there was perfect communication between Amy and the other child with whom she was working.

At one point Amy was very engrossed in putting together her puzzle, and the boy said to Amy, "Let's do this one next," and Amy was not looking at him, and he said again, "Let's do this one next," and she still was engrossed in her puzzle, so he tapped Amy on the knee, and he said, "Let's do this one next," and she said, "Okay", and I never saw that

he was impatient with her or that there was anything in a negative nature, but that he was able to communicate with Amy and she with him.

MR. ROBERTS: Could you locate the time frame?

[143]

THE WITNESS: Yes, this was the end of September.

MR. ROBERTS: Of what year?

THE WITNESS: Of this year in first grade.

A She seemed very happy at the completion of her task and she decided that now that we're all through, we'll all go see the turtle. They have a turtle inside on display, where she joined a group of other children. She joined them for some social activity.

The fourth activity she was playing store with a girl and they

both thoroughly enjoyed the game. Amy was the clerk and the girl was going to buy something at the store. When the girl finally left that group situation, I asked if I could play store with her, and she said yes and we started playing store together, and I found it a very delightful experience in that I have not -- I do not know how to sign.

I have not had any experience in working with deaf people before, yet she seemed to understand exactly what I was saying. She decided she would sell me anything I wanted to buy in that store and this was very good indication of her bright

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imagination and creativity.

She asked if I wanted to buy some ketchup or if I wanted potato

chips, and I would say yes and how much are they and she would tell me the price, and I would give her the money and she would give me my change.

At the end of the time when this informal acting was going on, the teacher called the children back for a large group instruction situation and not knowing that Amy knew that she had to go back at this time, I said, "Do you know you're supposed to return to the group now," and Amy said, "Oh, yes, but first would you like to buy some Pepsi Cola," and I said yes and she gave me my change.

She asked me if I would come back and I said, "I may come back," and she asked me what was I doing here. I said that I was a teacher and she said, "What grades do you teach," and I said, "Well, I teach first

grade, second grade, third grade, fourth grade and fifth grade," and Amy said, "You don't teach kindergarten," and I said, "No, at this point, I haven't taught kindergarten".

She said good-bye and she hoped I would come back and visit again. As I said, it was a delightful experience. She moved onto a large group

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instruction where the teacher was instructing the total class in front of the class with fisual objects on the board which they were to transfer to their paper.

Amy completed that assignment correctly and at that point, was asked to remove the Earmark because Mrs. Globerman had said she

does not use it to the for the total time she was there.

They prepared for lunch. She went through the line in the cafeteria just as any child would go through the cafeteria line. She seemed perfectly at ease. She seemed to have no problems whatsoever.

I saw Amy as a very comfortable child. I saw one who was very alert to the teacher and to the other children, one who has good work habits and skills, and I see her as a child whose social and academic interactions are excellent.

Q Mrs. Pappas, in your opinion, would the provision of an interpreter in Mrs. Globerman's class at this time add anything of value to Amy's educational progress or to her academic skills?

A Absolutely not.

MR. KUNTZ: Thank you. I have no further questions.

MR. CHATOFF: I would have to object to that. You're asking Mrs. Pappas' opinion as an expert in the area of educating a deaf child. I don't believe there have been any statements on the record indicating that she has any expertise in the area.

MR. KUNTZ: I didn't qualify her because of the pressure of time and try to meet the five o'clock deadline which I did, but I will ask her to state her qualifications for the record.

Q Would you tell us your background and experience?

A I received a bachelor of education from Tufts University. I

have an MS from New Rochelle in special ed.. I have been teaching, this is my eleventh year of teaching. I've had five years of experience in the regular classroom.

This is my sixth year as a resource room teacher and working in a special education situation.

Q As a resource room teacher, what do you do?

A I work with children who are handicapped in areas such as learning disabilities, emotional problems, slow learners, and I have had experience with a multiply-handicapped child.

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MR. ROBERTS: Do you still voice your objection?

MR. CHATOFF: Objection withdrawn.

MR. KUNTZ: I have no further questions.

CROSS EXAMINATION

BY MR. CHATOFF:

Q On your qualifications, you are qualified in special education. Is that special education involving deaf children? A special education teacher can be qualified in the area of deafness, blindness, palsied students. Is your qualification in the area of deaf children?

A No, it is not.

MR. CHATOFF: No further questions.

DISTRICT'S EXHIBIT 3 - EVALUATION OF J. JANIK

INTERPRETER SERVICES FOR AMY ROWLEY
"K" CLASS --- MS. POWER, TEACHER
MR. JACK JANIK, INTERPRETER
FURNACE WOOD SCHOOL
WEEKS OF FEBRUARY 27 TO MARCH 3
MARCH 6 TO MARCH 10

E V A L U A T I O N

After providing interpretive services through the above dates for Amy Rowley, I feel some explanation of my feelings are in order.

In general, interpreting was resisted by Amy almost constantly except during story-telling time which was approximately twenty minutes a day for three days a week. This is accountable since Amy was not used to or aware of this sudden, added attraction in her classroom. This naturally required some adjustment on her part. In fact, my presence did

make Amy different from the other children in their most natural environment which resulted in her initially resisting to cooperate with me.

Amy's teacher, Ms. Power uses the FM Transmitter and together with her concern, awareness and consideration for Amy, the child has everything going for her in a "hearing" school.

Amy functions like any of the other children there. She participates in all activities and assignments without any major problems. She is liked by her peers who <u>are</u> aware of her hearing loss and do speak to her when asking her questions or waiting for an answer.

Her understanding of the English language and how it works is average to above which makes for a lot easier

lip-reading on her part since prior understanding of the language in question is conducive to lip-reading of same. As skillful as she is, Amy however does not get everything and when she does miss something she stops the person(s) in question and has the message repeated.

After my two weeks in the classroom as an interpreter/observer, I feel free to say that Amy is a very well adjusted child despite a serious hearing impairment. But, this loss is the extent of her handicap since there seems to be no other learning hindrances. Amy's teacher is one in a million. She loves her charges and is a wonderful teacher. She does sign a little but more than that, she is a very expressive and talented woman.

The primary happenings in the

classroom are visually communicated. For example, when the children are using exceptionally loud voices or "outside voices", Ms. Power blinks the overhead lights and the children freeze in their positions. Immediately they know that they are making too much noise. After they are reminded to lower their voices, the lights go on again and their play continues using "inside voices." After my two weeks in this environment I can honestly say that I can't remember once hearing Ms. Power talk to the children like they were not young adults.

In conclusion, I would like to say that as far as interpretive services are concerned, they are not needed at this time. However, this does not rule out the fact that an

interpreter will not be needed at a future date when the classroom work becomes more involved and large group discussion becomes the rule.

This whole experience has been a pleasure for me and, if at anytime, I can be of further assistance, please do not hesitate to call on me.

Respectfully submitted,

S.J. Janik, Jr.

PETITION OF AMY ROWLEY TO THE NEW YORK STATE COMMISSIONER OF EDUCATION

STATE OF NEW YORK
COMMISSIONER OF EDUCATION
- - - - - - - - - - - - - -x

In the Matter of the
Education of
AMY ROWLEY, by her Parents,
CLIFFORD ROWLEY and
NANCY ROWLEY,

VERIFIED PETITION

Petitioners,

-against-

HENDRICK HUDSON SCHOOL DISTRICT,

Respondent.
- - - - - - - - - - - - - -x

TO THE COMMISSIONER OF EDUCATION:

The petitioners, CLIFFORD ROWLEY and NANCY ROWLEY, complaining of the respondent, respectfully show and allege:

1. We are now, and at all times hereinafter mentioned, have been citizens of the United States and resi-

dents of the City of Peekskill, County of Westchester, State of New York.

2. The Committee on the Handicapped of the Hendrick Hudson School District met on September 12, 1978 and again on October 3, 1978 to consider the indentification, evaluation, and placement of our daughter, Amy Rowley, who is deaf.

3. At the September 12 meeting, the COH declared Amy to be a handicapped child. On October 5, 1978, the COH recommended that Amy remain in the Furnace Woods School, Hendrick Hudson School District; that she receive the services of a teacher of the deaf one hour daily; and that she receive the services of a speech therapist three days each week.

4. We were not satisfied with that recommendation and therefore, within a

period of ten days (October 12, 1978), we wrote to you, the Commissioner of Education, requesting a formal impartial hearing. By letter dated October 18, 1978, Kenneth Pawson, Esq., of your office, informed us that the request should be made to the Board of Education of the Hendrick Hudson School District. On October 23, we mailed such a request to the Board of Education of the Hendrick Hudson School District and the request was received on October 25, 1978.

5. Pursuant to section 200.5(c)(10) of the Regulations of the Commissioner of Education, the impartial hearing must be held and the decision of the impartial hearing officer must be mailed to us within 45 days of the date on which the request for the hearing had been received. In lieu

thereof, the respondent reconvened its COH on December 11, 1978, 45 days after receipt of our request for an impartial hearing (the 45th day was a Saturday), ostensibly for the purpose of reconsidering its earlier recommendation based upon the affidavit of Robert R. Davila, Ph.D., the letter of Mr. Joel Ziev, protesting the misrepresentation of his position at the October 3 meeting of the COH, and other evidence that had been sent to the attorney for the respondent periodically for the purpose of disclosing material to be submitted at an impartial hearing. The COH reaffirmed its earlier recommendation verbatim with the addition of one innocuous provision (transcript, pages 138-139). Prior to the December 11 meeting of the COH (December 5, 1978), our

attorney wrote to the attorney for the respondent to emphasize that we were not withdrawing our October 23 request for an impartial hearing and that, if we disagreed with the "new" recommendation of the COH, the impartial hearing would have to be held and the decision of the hearing officer forwarded to us within 45 days of the receipt of that request. By letter of December 13, 1978, the attorney for the respondent attempted to argue, in effect, that the respondent's unilateral reconvening of its COH served as an automatic withdrawal of our request for an impartial hearing irrespective of the December 5 letter of our attorney. If the respondent was allowed to accomplish that legerdemain, the Regulations of the

Commissioner of Education would be rendered meaningless.

6. On October 26, 1978, one day following receipt of our request for an impartial hearing, Dr. Frank Eckelt was appointed as impartial hearing officer. After requests for information about Dr. Eckelt had gone unanswered, we made inquiries and learned of his professional association with the Superintendent of Schools of the respondent. On November 25, 1978, we sent to the respondent an affidavit requesting the replacement of Dr. Eckelt for reasons of personal bias. On November 29, 1978, Dr. Eckelt was dismissed for reasons of personal bias. On December 15, 1978, more than 45 days after receipt of our request for an impartial hearing and less than one

week before the actual hearing, Albert P. Roberts, Esq. was appointed hearing officer. We discovered that Mr. Roberts has been an acquaintance of the attorney for the respondent for at least three or four years. Our attorney brought this to the attention of Mr. Roberts and the attorney for the respondent prior to the commencement of the December 20 hearing; at that time, he stated that no request would be made for the appointment of a new hearing officer. It seemed to us that, under no circumstances, would the respondent appoint a truly impartial hearing officer and that continuous objections to the appointment of each new biased hearing officer would serve only to delay this matter. We decided that it was best to conduct a hearing on December 20,

have the facts brought as fully as would be permitted, and then present the matter to you, the Commissioner of Education, for an impartial review of the evidence.

7. We received a copy of Mr. Roberts' decision on January 16, 1979.

8. On page 2 of his decision, Mr. Roberts states that interpreters and transcribers were used by our attorney, who is deaf, and by us "to assist them in hearing the course of the testimony given at the hearing." (Emphasis added) Everyone involved concedes that Amy Rowley is deaf; the hearing involved consideration of the problems of deafness. Just as you cannot teach or assist a blind person to see, you cannot teach or assist a deaf person to hear. You can teach a blind person to comprehend what is

before him; you can teach or assist a deaf person to comprehend what is spoken. Any person who is unwilling or unable to understand that very important distinction is not competent to consider questions of deafness.

9. On page 4 of his decision, Mr. Roberts stated that the memoranda of law of the parties were not considered when reaching his factual conclusions. Closing arguments by opposing attorneys are part of administrative proceedings. Because time did not permit, there were no closing arguments at the December 20 hearing. Prior to the conclusion of that hearing, our attorney asked: "Are you ready for closing statements?" Mr. Roberts replied: "You can reserve that for your written brief." (153) By the clear language of the hearing

officer, the memoranda of law and all papers attached thereto, must be considered as a part of the record of the proceedings for purposes of the hearing officer's decision and subsequent appeal.

10. Mr. Roberts states that the letter from Mr. Joel D. Ziev "in substance indicates that since he had not observed Amy in her school setting that he would be unable to either support or reject the use of an interpreter within the classroom setting." Clearly, that statement would not be helpful to our position. It does not require a great degree of perspicacity to realize that parties to a proceeding are not likely to introduce voluntarily evidence that is objectionable to their position. If Mr. Roberts could not glean the purport of the

letter from its face, he might have referred to the transcript of the proceedings. On page 131, it is indicated quite clearly that Mr. Ziev wrote to Ms. Waldron, the Chairperson of the COH, to object to the misrepresentation of his views, by a member of the COH, at the committee's October 3 meeting.

11. Mr. Roberts omits entirely any reference to our Exhibit No. 2, a memorandum of law prepared by our attorney showing the legal basis for the appointment of an interpreter for a deaf child educated in the least restrictive educational environment. The memorandum includes a statement, made on the Floor of the United States Senate by the ranking minority member of the Subcommittee on the Handicapped, to the effect that the

purpose of the Education for All Handicapped Children Act of 1975 is "to guarantee that properly trained interpreters would be available to our school age deaf population." (The memorandum had been drafted at the request of the attorney for the respondent.)

12. Mr. Roberts understanding of our Exhibit No. 3 is misguided at best. The memorandum, prepared by the Office of Compliance and Enforcement, Federal Office of Civil Rights, states quite clearly that a deaf child must be educated in the least restrictive educational environment with the aid of supplementary aids and services. Primarily, it deals with matters to be considered in the selection of appropriate supplementary aids and services and the extent of review by that Office of individual educational

determination. The placement of a deaf child in a separate or segregated class is mentioned in passing only and only as a last resort (see Hairston v. Drosick, 423 F. Supp. 180, 183 (S.D.W.Va., 1976)).

13. With reference to the statement on page 7 of the decision, regarding the affidavit of Dr. Davila, that interpreter services implement and enhance the communication and camaraderie and hearing among deaf students, see our paragraph no. 8.

14. Ms. Williams was the only witness for the respondent who has had any experience in the education of deaf children. Mr. Roberts did not note that Ms. Williams testified that she uses total communication with Amy during their daily sessions; that she supports the use of total communica-

tion as an effective teaching method in the education of deaf children; and that she agrees with the statements of the experts who support our position (the only expert evidence offered in the proceeding).

15. Mr. Roberts did not note that Ms. Garzione testified that she is interested in Amy's transmittive skills only; that she has no interest in her receptive skills.

16. Mr. Roberts did not note that Ms. Pappas testified that she is not qualified in the area of education of deaf children.

17. Mr. Roberts noted correctly that I (Mr. Rowley) testified that two members of the School Board, who were not present at the hearing, objected to the cost of hiring an interpreter. Naturally, the respondent could not be

expected to respond to statements made by individuals who were not present at the hearing. Mr. Roberts conveniently omitted mention of the fact that I testified that Dr. Zavarella objected to the cost too; that Dr. Zavarella conferred with the attorney for the respondent on my testimony; and that Dr. Zavarella did not take the stand at that time to refute my testimony.

18. Mr. Roberts determined that we are not entitled to an independent educational evaluation. Of course, he has no authority whatever to make such a determination. Upon request, we are entitled, absolutely, to an independent educational evaluation of Amy (Section 200.5(b)(2)(vi) of the Regulations of the Commissioner of Education and 45 CFR§503). By letter of October 26, 1978, the attorney for

the respondent acknowledged receipt of such a request. The evaluation must be at public expense unless the hearing officer, on motion, determines that the parents of the child shall pay therefor. Inasmuch as the attorney for the respondent made no such motion, the hearing officer had no authority to make any determination concerning the request for an independent evaluation. Hence, the provisions of the regulations apply and the evaluation must be provided at public expense.

19. The original testimony of Ms. Globerman was to the effect that she, and Amy's other teachers, formulated a plan for Amy without our participation or input and that the plan had merely been read to us at the December 6, 1978 meeting. Her later testimony

indicated that I (Mrs. Rowley) offered to provide her with information concerning the preparation of an IEP. That testimony relates solely to the procedural preparation of an IEP and indicates no participation or input in the formulation of an IEP for Amy. Additionally, her later testimony was to the effect that I (Mr. Rowley) offered recommendations at the December 6 meeting that were included in District Exhibit No. 7. That testimony contradicts in its entirety Ms. Globerman's earlier testimony. Rather than categorize that glaring inconsistency as "uncontradicted testimony", Mr. Roberts might have taken the time to review the material presented to him. The sheets entitled "Parents Comments" of District Exhibit No. 7 are completely blank. The

Exhibit itself indicates that the plan was formulated in October and November of 1978. Furthermore, District Exhibit No. 8 contains the minutes of that meeting; it contains the recommendation that I offered. I asked the individuals present at the meeting to help Amy if she needs help. That is nothing more than a plea by a person who has been left out of deliberations "to do right by my child." It cannot be considered the input contemplated by State and Federal regulations. Finally, the inconsistent testimony of Ms. Globerman followed immediately after an off the record discussion (111).

20. According to section 200.4(f)(2)(ii) of the Regulations of the Commissioner of Education, a planning conference for the development of an

IEP shall include, inter alia, the parents of the child in question and other individuals at the discretion of the parents. The regulation presupposes that any advice offered by such individuals will be considered by the members of the planning conference. Obviously, a person may appear in person or by sworn affidavit. At the December 6 meeting, we distributed copies of the affidavit of Dr. Robert R. Davila to the individuals present. Nevertheless, Dr. Zavarella dismissed the affidavit summarily. "The point was made that although interesting to us it can have little or no bearing on the development of an IEP." (District Exhibit No. 8)

21. Pursuant to section 4402(1)(b)(1) of the Education Law, a COH "shall invite the appropriate professionals

most familiar with a child's handicap or handicaps to attend any meeting concerning the educational program for such child." (Emphasis added) Inasmuch as the statutory reference is to the child's handicap rather than to the child himself, it seems logical to assume that the reference is to experts to the particular discipline involved -- in this case, the education of deaf children. Nevertheless, the COH did not invite any experts in the area of the education of deaf children to attend any of its meetings. Mr. Denis, a nationally recognized expert in the education of deaf children appeared at the September 12 meeting at our request. Dr. Davila, another nationally recognized educator of deaf children, prepared an affidavit, again at our request, which was

made available to the members of the COH at its December 11 meeting. The committee dismissed out of hand the views of those two educators despite the implicit language of the statute that it take into consideration the views of experts in the field involved. In his decision, Mr. Roberts declared that the views of those two experts and the views of another expert, Dr. Richard G. Brill, "are accorded little weight." (Decision, page 22)

22. Pursuant to section 200.5(b)(2)(ii) of the Regulations of the Commissioner of Education, the respondent must provide us with a notice describing each test or report that it has used as a basis for its proposed actions. We received no such notification. According to the Commissioner

of Education, "a hearing officer in the course of due process proceedings must be provided with the materials upon which the recommendation of the committee [on the handicapped] was based and not merely with the conclusion arrived at by the committees." Matter of the Appeal of Rosanne N., 16 Education Department Reports 346, 347. The respondent has offered only one report by a person not in its employ, i.e., the report of S. Jack Janik, Jr., the interpreter for Amy during a two week trial period during the early part of 1978. It has offered only one report by a person with expertise in the area of deaf children, the same report of S. Jack Janik, Jr. Indeed, unless the short statements by persons in the employ of the respondent who have no expertise

in the area of education of deaf children that are set out in District Exhibit No. 7 (the admission of which we objected to under section 200.5(c)(8)) are considered reports, the report of Mr. Janik is the only report offered by the respondent -- and those short statements were each prepared after the COH decision of October 5. The report of Mr. Janik supports our position; not the position of the respondent.

23. Attached hereto and made a part hereof is an affidavit prepared by me (Mrs. Rowley) concerning Amy's comprehension of class material and the results of my observation of her in class. Document No. I.

24. Attached hereto and made a part hereof is the affidavit of Mr. Roy K. Holcomb, the Coordinator of the Santa

Clara County Programs for the Hearing Impaired. Document No. II.

25. Attached hereto and made a part hereof is the affidavit of Mr. Michael Deninger, the Coordinator of Public Law 94-142 for Gallaudet College. Document No. III.

26. Attached hereto and made a part hereof is the affidavit of Ms. Mary H. Sheie, a teacher of the deaf and an interpreter for the deaf. Document No. IV.

27. Attached hereto and made a part hereof are all communications between our attorney and Mr. Roberts during the period from December 26, 1978 to January 6, 1979. Document No. V.

28. Attached hereto and made a part hereof is the affidavit of S. Jack Janik, Jr. Mr. Janik's qualifications have been set out by Dr. Zavarella at

page 39 of the transcript. Document No. VI.

29. Attached hereto and made a part hereof are copies of papers included in Amy's file maintained by the respondent. They show that considerations other than Amy's best interests were the deciding factors in the respondent's refusal to appoint an interpreter for Amy. Document No. VII.

30. We have repeatedly requested that an interpreter be appointed for Amy so that she would be able to understand what is going on in class; the respondent has repeatedly refused to honor that request. The evidence submitted at the December 20, 1978 hearing and the attached documentary evidence establish the need and justification for the appointment of an interpreter for Amy.

31. The respondent has offered, at various times, several different justifications for its refusal to appoint an interpreter for Amy. It has argued that most of the information transmitted in class is visual. The attached observations show that a very substantial portion of information in Amy's class is transmitted orally. The respondent has argued that Amy lipreads well and that, therefore, she understands what is spoken orally without the aid of an interpreter. That argument was offered by people who have no knowledge of the problems of deaf individuals. The affidavits of Dr. Davila and Mr. Holcomb, both of whom are deaf, make clear that that argument has no basis in reality. It has been suggested that Amy is very "teacher-oriented." As a result of my

observation (Mrs. Rowley), it is apparent that Amy is teacher-oriented towards the teacher she understands, i.e., Ms. Williams, who uses total communication; that she is inattentive when she does not understand what is being said.

32. Amy spends one hour daily with Ms. Williams. Admittedly, Amy understands what is happening during that one hour session. Thus, in the final analysis, the respondent is arguing that it is providing Amy with an appropriate education by providing her with the opportunity to understand what is being said one sixth of the school day. On the other hand, we contend that where, as here, a particular supplementary service (an interpreter) will enable a child with a handicapping condition to understand

what is going on at all times (when academic material is presented), a school district must, according to State and Federal law, provide the child with that service (section 200.4(a)(2) of the Regulations of the Commissioner of Education; 20 U.S.C. § 1412(5)(B); 45 CFR §84.34(a); and 45 CFR §121a.550 et seq.). A school district is required to provide each child with a handicapping condition a full educational opportunity (45 CFR §121a.304); to provide each such child with an appropriate education conterminous with the education provided to his/her peers who do not suffer from such a disability (45 CFR §84.33 (b)(1)). We contend that our daughter is not being provided with a full educational opportunity or an appropriate education when she is supplied

with only enough services to enable her to understand one sixth of her school day.

33. Our daughter can be, should be, and by statute must be educated with her peers who can hear. Per force, there are different matters to be considered in the education of a deaf child. If a deaf child is to be properly integrated with her hearing peers, those matters must be considered by an expert in the education of deaf children so that the proper aids and services will be selected to assure the child a full educational opportunity. Certainly, those matters cannot properly be considered by individuals who have no expertise in the education of deaf children.

34. It may be expensive to provide our daughter with an appropriate

education -- generally, it is more expensive to educate a child with a handicapping condition than a child without a handicapping condition -- but the alternatives (the needless transfer of Amy to a separate facility that would severely limit or prohibit her interaction with her peers who have normal hearing or the less than full development of her skills and abilities) are not acceptable. Most definitely, she has a handicapping condition. We do not want her to grow up to be a handicapped person; we want her to grow up to accept her disability and to learn to compensate for it so that she will be able to attain the full measure of her dreams and aspirations and achieve the full measure of her individual capacities and abilities.

35. Obviously, the respondent is concerned and should be concerned with the cost of educating Amy properly. But its educational determinations must be based soley upon her best interests. Only after the respondent has reached a determination based solely upon her best interests, should it consider the question of limiting costs -- without, in any way, compromising Amy's best interests. It is clear to us that the best interests of our daughter require the use of an interpreter in academic settings to enable her to comprehend what is being said. Two less costly alternatives to hiring a per diem interpreter come to mind immediately; undoubtedly others would come to mind were a little thought applied. Many arrangements used to implement the New York and

Federal laws mandating the provision of an appropriate education to each child with a handicapping conditon are inconsistent and/or duplicative. Proper coordination would assure that children with handicapping conditions would receive appropriate educations at considerably less cost.

WHEREFORE, the petitioners ask that the Commissioner of Education: (1) direct the respondent to provide the petitioners with information about where an independent educational evaluation of Amy may be obtained at public expense or, in lieu thereof, that the respondent reimburse the petitioners for the cost of the observations of Mr. Deninger and Ms. Sheie, inasmuch as Amy's school records should contain such an evaluation; (2) revise the recommendation of the respondent's committee on the handicapped to read as follows:

a. That Amy Rowley remain at Furnace Woods School;

b. Resource Programs:

1. that Amy Rowley receive the services of a speech therapist three times weekly;

c. Supportive Supplementary Assistance:

1. that Amy Rowley receive auditory amplification by use of the FM Wireless or the Unitron 960P, and
2. that an interpreter be appointed for Amy Rowley to interpret for her when academic subjects are taught (including, but not limited to, reading, mathematics, writing, and spelling);

(3) direct the respondent to draft an individualized education plan for Amy Rowley, with the petitioners; (4) grant the petitioners their costs and attorney's fees; and (5) grant the petitioners such other and further relief as justice may require.

Dated: February 24, 1979
Peekskill, New York

CLIFFORD ROWLEY
NANCY ROWLEY
Petitioners

AFFIDAVIT OF NANCY ROWLEY

DOCUMENT I

STATE OF NEW YORK
COMMISSIONER OF EDUCATION

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In the Matter of the
Education of

AMY ROWLEY, by her parents
CLIFFORD ROWLEY and NANCY
ROWLEY,

Petitioners, AFFIDAVIT

-against-

HENDRICK HUDSON SCHOOL
DISTRICT,

Respondent

- - - - - - - - - - - - - - - - x

STATE OF NEW YORK)
COUNTY OF QUEENS)

NANCY ROWLEY, being sworn, deposes and says:

1. I am one of the petitioners in the above-entitled action.

2. I am the natural mother of Amy Rowley.

3. I am deaf and I am a certified

teacher of the deaf. Nevertheless, Ms. Garizone, who testified that she has worked with only one other deaf child besides Amy and does not know manual communication, indicated that she knows more about the problems of deafness than I do. Dr. Zavarella indicated that he is an authority on the education of deaf children by virtue of his Ph.D in child development, despite the fact that he has not had any contact with deaf children. Mr. O'Hara, a member of the COH and the principal of the Frank Lindsay Elementary School, stated that there was no need to appoint an interpreter for Amy at this time because "first grade is not that important."

4. I did not provide extensive testimony concerning Amy's educational achievements and non-achievements due

to her deafness because I consider her lack of comprehension to be understood in light of the definition of "Deaf" that appears in 45 CFR§121a. 5(b)(1) ("a hearing impairment which is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, which adversely affects educational performance"). However, in light of Mr. Roberts' decision, I offer the following:

5. I discuss Amy's day in school with her on a daily bais, using total communication. I learn, on a daily basis, that she does not understand what is said in class.

6. On February 2, 1979, Amy came home from school and said to me: "I want the interpreter", because she does not understand what is being said in class.

does not understand what is being said in class.

7. Amy has an IQ of 122; she has been described by her teachers as "highly motivated", "eager and inquisitive", and "eager to learn". (See District Exhibit No. 7). Attached are two examples of the comprehension and English language ability of this intelligent child who is eager to learn. She asked me to explain the sentence; "How nice to be a frog, I can sit all day on a log", because she did not understand what she had written. When asked to write a sentence, she put some words together that formed a "sentence" that made no sense.

8. On several occasions during the early part of this year, I observed Amy in class.

9. Amy has several different teachers. One male teacher has a beard and mustache which hide his lip movement; a female teacher talked with her head down, failed to demonstrate anything manually, and generally indicated a lack of orientation on how to deal with a hearing impaired child in her classroom. Ms. Globerman is not as easy to lipread as I had expected; further, she acts towards Amy just as she acts towards every other child in her class, e.g., she explains new ideas to the class with her back to all the students, including Amy.

10. The desks in Ms. Globerman's class are arranged in such a way that Amy can see only the backs of one fourth of the other students.

11. I would estimate that seventy percent of academic material is conveyed to the students in Amy's classes orally. I am considered to be a good to excellent lipreader. I understand, at most 30 percent of oral communications during my period of observation. Each day of my observation period, when I returned home I tested Amy to see how much of what I understood she understood. She failed to understand or misunderstood much of that information.

12. Ms. Williams uses total communication in her daily sessions with Amy. During those daily sessions, Amy is attentive and eager to learn. During Amy's other classes, she is attentive when material is presented visually or when she writes or works individually -- she is

inattentive when material is presented orally, which she cannot understand.

13. I want Amy to understand everything in class that other students understand; I do not want to see her fall behind other students in her class because of a disability that can be compensated for.

14. An interpreter would enable Amy to understand oral communications in class -- communications that she does not understand now. Also, if an interpreter were assigned to assist Amy, her teachers would not have to devote more time to her than they

devote to every other child in their classes.

NANCY ROWLEY

Sworn to before me this

_____ day of February, 1979.

EXHIBIT TO ROWLEY AFFIDAVIT - EXAMPLES OF COMPREHENSION AND ENGLISH LANGUAGE ABILITY OF AMY ROWLEY

Amy

How nice to be a frog.
can sit all day on a log.

1 for home work write 2 more sentences

This doen't make any sense!

called my valentine asked

The bed a valentine said the bed.

The mouse said a owl I never heard of that

AFFIDAVIT OF MICHAEL L. DENINGER

DOCUMENT III

STATE OF NEW YORK
COMMISSIONER OF EDUCATION
----------X
In the Matter of the
Education of
AMY ROWLEY, by her Parents, CLIFFORD ROWLEY and NANCY ROWLEY,

AFFIDAVIT

Petitioners

- against -

HENDRICK HUDSON SCHOOL DISTRICT,

Respondent.
----------X

MICHAEL L. DENINGER, being sworn, deposes and says:

1. I am Michael L. Deninger, Coordinator of Public Law 94-142 Program at Gallaudet College, Washington, D.C. A major purpose of this program is to monitor and evaluate the implementation of Public Law 94-142, specifically as it relates to the education

of hearing impaired persons.

2. I am an educator of the deaf with more than 10 years of experience in all aspects of education and rehabilitation of deaf persons. I hold an M.S. degree in education of the deaf and am a candidate for the Phd. in Special Education Administration from Gallaudet College. I have taught in and/or administered all levels of programs for deaf students, including positions at the Model Secondary School for the Deaf (Washington, D.C.), St. Mary's School for the Deaf (Buffalo, New York), and the National Technical Institute for the Deaf (Rochester, New York). I am a certified interpreter for the deaf, a trainer and evaluator of interpreters and a past president of the Potomac Chapter, Registry of

Interpreters for the Deaf. In my present position I am responsible for the development and dissemination of information about Public Law 94-142 and its impact on the education of deaf persons.

3. At the request of the above-mentioned petitioners, I did observe Amy Rowley in classes at the Furnace Woods School on Thursday, February 15, 1979, in order to assess the extent to which Amy was understanding what occurred inside and outside of the classroom and to determine whether or not an interpreter would be necessary to provide Amy an appropriate program.

4. Based on all of my observations, my discussion with Amy, her parents and the teachers and

Principal of her school, I offer the following:

i. Amy is a profoundly deaf child whose amplification system at school consists of an FM Wireless Trainer which her teachers use to assist in communicating with her.

ii. Amy receives one hour of instruction per day from Ms. Sue Williams, a teacher of the deaf. The auditory training exercises I observed in Ms. Williams' class indicated that Amy does receive sound input from the FM Wireless system, but that comprehension is negligible without simultaneous speechreading.

iii. Amy had no difficulty in understanding the instructions of Ms. Williams because she used a combination of speech and sign language when communicating with Amy.*

*In order to estimate in a more objective fashion the degree to which Amy was understanding and involved in the classroom communication process, a simple scale was adapted from the work of Ned Flanders and others with "Interaction Analysis". Using this scale I noted periodically (usually once every 30 seconds) who was controlling the conversation and, whether Amy was understanding or not. For the

5. In a small reading group led by Mrs. Globerman Amy understood only approximately 25% as the teacher and students read aloud from their books. Amy understood simple questions and instructions from the teacher, but, while the FM Wireless was passed from student to student the teacher's comments were not received by Amy. Amy

---

purpose of gathering this information, Amy was assumed to be understanding unless she was clearly confused, asked irrevelant questions, or was not watching the face of the speaker (this based on the fact that Amy's comprehension is negligible with amplification alone).

was able to "keep her place" by depending on visual clues from other students. However, during the class Amy had little access to the spoken word.

6. In an afternoon portion of Mrs. Globerman's class a story was read to the entire class by the teacher and an aid. The students were seated on the floor, on desks, chairs and some stood. Amy was seated on the outside of the group to the far right. One-half of the story was read by the aid at a very fast pace. It is my conclusion that Amy understood less than 10% of what was read. This is reinforced by the fact that Amy rarely attended to the face of the reader. Finally, countless questions or spontaneous remarks from students were missed by Amy because she was unable

to lipread them. An interpreter could have kept Amy informed.

7. In art class with Mrs. Garber Amy understood little of what was said, but was able to follow the demonstration of how to do the project. The teacher rarely faced Amy to allow her to lipread and talked at a very rapid pace. Again, Amy was able to use visual clues to see what to do, but she understood less than 10% of the discussions.

8. Generally speaking, when Amy was in small group discussions with one or more students she comprehended approximately 40% of the discussion. When Amy initiated discussions, she was understood by other students approximately 50% of the time.

9. During special assemblies, movies or field trips, Amy does not

have the assistance of an interpreter. Because of the distance away from the speaker and environmental aspects such as lighting, Amy probably understands little of what transpires. Ms. Williams agreed to the need for an interpreter in these settings.

10. It appeared that Amy's teachers and Principal did not fully comprehend the isolation effect of a profound hearing loss or the limitations of amplification devices. Each of Amy's teachers began sessions by asking Amy if she "could hear". To me this means "Is your trainer working" and definitely not "Are you understanding me?" Dr. Zavarilla commented that he thought Amy is getting more from the auditory trainer than Ms. Rowley thinks.

11. In my professional opinion Amy Rowley is currently in need of an interpreter if her placement at the Furnace Woods School continues. Amy is at a particular disadvantage when group presentation or discussions occur and, even with adequate seating and amplification, she will continue to be deprived of much of the communication that takes place around her.

12. The need for professional interpreters in regular classrooms has been elaborated on previously in this question (See affidavit of Dr. Robert R. Davila). I assisted with the development of this affidavit and subscribe to its major tenets. I further believe that I have demonstrated in this affidavit that some of the potential problems that arise when a deaf child is placed in a regular classroom

were observed at the Furnace Woods School. Teachers talking too fast or not facing the deaf student, poor seating arrangements and unrealistic expectations from amplification equipment are among these.

13. An interpreter service, carefully planned and executed would greatly improve the communications process for Amy Rowley and increase her ability to achieve even more academically, while also reducing the possibility of any harmful effects on her due to inadequate communication with her teachers and her peers.

MICHAEL L. DENINGER

(NOTARIZATION)

AFFIDAVIT OF MARY H. SHEIE

DOCUMENT IV

Affidavit Prepared by:

Mary H. Sheie, M. Ed.
Teacher and Sign Language
Interpreter for the Deaf
Goshen, NY 10924

I am Mary H. Sheie of Goshen, New York. I am a certified teacher of the deaf and interpreter for the deaf. My certification also extends to nursery, kindergarten, and grades one through six. My seven years of experience include teaching the deaf, teaching American sign language, interpreting for the deaf in courts, classrooms, and social services, and serving as a manual language consultant for agencies that service non-verbal children and adults. In this affidavit, I would like to report on the observations I made of Amy Rowley in the Furnace Woods School on February

2, 1979.

I first observed Amy in a class discussion about ground hog day. The teacher, Mrs. Regina Globerman, faced the class in this discussion, using the microphone of the FM wireless as she addressed them. The class was seated in a "U" shape. During the discussion, Amy did not always watch the teacher or other members of her class. However, she freely participated in the discussion, giving correct answers and responses. Because I was not able to be absolutely certain how much of the discussion she was receiving (either visually or auditorily), I feel that there is a need for formal tests to determine the actual percentage of comprehension in a large group discussion.

Amy then moved to a small reading

group which was seated around a rectangular table. She was in the first seat on the teacher's left. The teacher wore the microphone of the FM wireless when she spoke and passed it to each child to use as he or she read. Some children were not visible to Amy while they read. Consequently, it was not possible to determine through observation alone whether she was hearing or speechreading what they were saying. The only time she appeared to be lost was when another child was being given feedback on his pronunciation of a word. Again, the question of whether Amy is comprehending detail in class discussions, small or large group, warrants further and more accurate testing. After the reading group was finished, the children were required to complete a

written assignment related to the story just read. Amy returned to her seat to do the work independently. She worked quietly, and asked the boy next to her for help several times. It was questionable at this point whether she had understood the directions for this assignment. This is another area in which I feel she should be formally tested--to see if she can follow verbal directions for a written assignment such as this, and also how this compares with other students' performances of the same task. In addition, Amy may need to be checked routinely on whether she is encoding and decoding oral and written information rather than recoding, something deaf children frequently exhibit, masquerading as comprehension.

Following completion of written work, Amy went for her daily individual session with the teacher of the deaf, Ms. Sue Williams. The session included an auditory training lesson and a speech and language activity emphasizing rhyming words. Here again, I observed the need for ascertaining a percentage reading of Amy's reception of oral communication, i.e. how many repetitions are needed for speech reception--one, two, or more--and what percentage of the time does Amy respond on one, two, or more repetitions on both predictable and random material? This conclusion was based on the observation that even in this one-to-one situation Amy needed repetition, and these lessons were very predictable.

After the latter session was completed, Amy returned to her class who was in the middle of a discussion about a film they had just seen. I observed that Amy seemed unable to pick up on the context of the discussion. Many variables were changed, e.g. a different teacher was leading the discussion, the room was very crowded as there were two classes meeting together in this room, and there was a question as to whether Amy was able to make use of her hearing aid (the FM wireless). This appeared to be the most complex of the morning's varied communication situations. It is not surprising that Amy appeared to be totally lost.

I also observed Amy during her lunch period and noted that she was not socializing with her peers on more

than a superficial level. This was also noticeable to a lesser degree earlier in the day.

After lunch, Amy rejoined her class for the viewing of a film about Eskimos. She sat in front but was far from the sound source. She indicated that she could not understand what the film was about. It was my observation that she should be tested also for her auditory discrimination abilities for films in particular.

To summarize, the impression I gained from observing Amy Rowley in her first grade class at Furnace Woods School was twofold: (1) There is a great need to establish an accurate, objective testing procedure for Amy to monitor her progress. Characteristically, deaf children are too quick to hide their failure to understand, and

Amy is no exception. One cannot, by mere observation, determine how much material Amy is comprehending. Therefore, such testing should especially focus on comprehension skills of information presented--in class discussions, in small group discussions, in one-to-one situations, in social situations where more than one person is speaking, and in assemblies and/or viewing of films. It should be the kind of testing that provides clearcut statistical data--a proportion of information she is getting in each of the various situations. Such data should also be collected on a hearing student of comparable abilities to provide a source of comparison. If, in fact, such data shows that Amy is not receiving certain information as readily as her peers, then her present

supplemental services should be re-evaluated. Also, if the information she is not receiving consists primarily of details, then other measures should be taken to determine the impact of this deprivation of tertiary input on her educational future. It would also be important that this testing be done by a professional qualified in the field of deafness--not a speech clinician but a language and reading specialist--who can do an independent, objective evaluation. (2) Amy's apparent social isolation should be taken into consideration. Perhaps further observtions could be done to verify if this is in fact, true.

In conclusion, I would like to state that this observation report is in no way an attempt to undercut the

efforts of the staff at Furnace Woods School. They are making valuable contributions to insure Amy's success in school. However, it appears that these efforts, no matter how valiant, cannot bridge the communication gap between Amy and her educators. Visual presentation of oral communication is the only sure way to guarantee that a mainstreamed deaf child is receiving information with the same accuracy and consistency as his or her hearing peers. For this reason, interpreter services should be considered in the event that independent, objective evaluation reveals the existence of a communication gap.

Mary H. Sheie, M. Ed.
Teacher and Interpreter
for the Deaf
Goshen, NY 10924

date

Sworn to, before
me, this 13th day
of February, 1979

Notary Public

AFFIDAVIT OF S. JACK JANIK, JR.

DOCUMENT VI

STATE OF NEW YORK
COMMISSIONER OF EDUCATION
----------X
In the Matter of the
Education of
AMY ROWLEY, by her Parents,
CLIFFORD ROWLEY and
NANCY ROWLEY,

AFFIDAVIT

Petitioners

- against -

HENDRICK HUDSON SCHOOL DISTRICT,

Respondent.
----------X

STATE OF NEW YORK)
:
COUNTY OF NEW YORK)

S. JACK JANIK, Jr., being sworn, deposes and says:

1. At present, I am self-employed.

2. From February 27 to March 10, 1978, I served as the interpreter for Amy Rowley in her kindergarten class at Furnace Woods School, Hendrick Hudson School District, Westchester, New York. The class was taught by a Ms. Power.

3. The purpose of this affidavit is to clarify the evaluation I prepared following the period during which I provided interpreter services for Amy. I did not say that Amy did not need an interpreter in kindergarten. My evaluation was limited to that particular class of Amy's and not to kindergarten classes generally. I stated that interpreter services were not needed in that particular class only, because of Ms. Power's "concern, awareness and consideration of Amy" and because Ms. Power "is a very

expressive and talented woman." Nor did I indicate that an interpreter would not be needed for Amy subsequent to kindergarten; indeed, my evaluation suggests that an interpreter will be needed "at a future date when the classroom work becomes more involved and large group discussion becomes the rule."

4. Following the two week period during which I provided interpreter services for Amy, Dr. Zavarella, the principal of Furnace Woods School, stated that the Board of Education of the Hendrick Hudson School District would not retain an interpreter for Amy irrespective of my findings during the two week trial period because it deemed the cost excessive. Also, Dr. Zavarella suggested that it would be in the best interests of all parties

for Mr. and Mrs. Rowley to take Amy out of the Furnace Woods School and enroll her in the New York School for the Deaf in White Plains.

S. JACK JANIK, Jr.

[Notarization]

AMENDED COMPLAINT OF AMY ROWLEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

AMY ROWLEY, by her parents and natural guardians, Clifford and Nancy Rowley, and Clifford and Nancy Rowley, in their own right,

Plaintiffs

v.

The BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, Westchester County, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants.

AMENDED COMPLAINT

Civil Action File No. 79/2139

----------X

The plaintiffs, for their complaint and claims against the defendants, through Michael A. Chatoff, their attorney, allege:

1. The action arises under section 615 of the Education of the Handicapped Act, as added by 89 Stat. 788,

U.S.C., Title 20,§1415; section 504 of the Rehabilitation Act of 1973, 87 Stat. 394, U.S.C. Title 29, §794; U.S.C. Title 28, §1343; U.S.C. Title 42,§ 1983; and section 4403(3) of the Education Law of the State of New York, as implemented by section 200.5(c)(10) of the Regulations of the Commissioner of Education of the State of New York, as hereinafter more fully appears.

2. Plaintiffs are now, and at all times herein mentioned were, citizens of the City of Peekskill, County of Westchester, State of New York.

3. Plaintiffs live within the boundaries of the defendant school district.

4. Plaintiffs have exhausted all administrative remedies set forth in the statutory provisions enumerated in

paragraph one hereof.

5. The defendant school district has failed to provide Amy Rowley with an education conterminous with her nonhandicapped peers, in violation of the requirements of the Education of the Handicapped Act, as amended by the Education for All Handicapped Children Act of 1975, Public Law 94-142, as implemented by 45 CFR§121a.1 et seq.; section 504 of the Rehabilitation Act of 1973, 29 U.S.C.§794, as implemented by 45 CFR§84.31 et seq.; and section 4401 et seq. of the Education Law of the State of New York, as implemented by section 200.1 of the Regulations of the Commissioner of Education of the State of New York.

6. Plaintiffs have been denied the due process of law guaranteed to them by the Fifth and Fourteenth Amendments

to the Constitution of the United States and by Federal and State statutes, by the appointment of a hearing officer by defendant school district who was neither impartial nor competent to review the matters in controversy and by the failure of the defendant, Commissioner of Education, to review the record before him independently and impartially.

WHEREFORE, it is demanded that this court:

(1) revise the recommendation of the defendant school district's committee on the handicapped to read as follows:

a. That Amy Rowley remain at Furnace Woods School;

b. Resource Programs:

1. that Amy Rowley receive the services of a speech therapist three times weekly;

c. Supportive Supplementary Assistance:

1. that Amy Rowley receive auditory amplification by use of her own hearing aids, which are Unitron 960Ps, and

2. that a certified sign language interpreter be appointed for Amy Rowley to interpret for her when academic subjects are taught (including, but not limited to, reading, mathematics, writing, and spelling);

(2) direct the defendant school district to draft, with Mr. and Mrs. Rowley, an individualized education program (IEP) for Amy Rowley in accordance with the revised recommendation of the committee on the handicapped;

(3) award the plaintiffs their costs and attorney's fees in accordance with section 505(b) of the

Rehabilitation Act of 1973, 29 U.S.C.§ 794(b); and

(4) grant the plaintiffs such other and further relief as justice may require.

MICHAEL A. CHATOFF
Attorney for Plaintiffs
192-05 Radnor Road
Jamaica, New York 11423
(212) 464-7622

ANSWER OF DEFENDANT HENDRICK HUDSON CENTRAL SCHOOL DISTRICT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMY ROWLEY, by her parents and natural guardians, Clifford and Nancy Rowley, and Clifford and Nancy Rowley, in their own right, Plaintiffs	AMENDED ANSWER Civil Action File #79/2139
- against -	
THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, Westchester County,	
- and -	
COMMISSIONER OF EDUCATION of the State of New York, Defendants.	

Defendant, Hendrick Hudson Board of Education, by its attorneys Kuntz and Spletzer, P.C., answers the Complaint of the Plaintiffs as follows:

1. Denies each and every allegation contained in paragraphs 1, 2, 3, 4, 5, and 6.

2. As and for an affirmative defense, alleges each of the grounds set forth in the Motion to Dismiss the Complaint, including the ground of no standing to sue for lack of a private right of action, as if the same are fully set forth herein.

Dated: September 19, 1979

Yours, etc.,

KUNTZ & SPLETZER, P.C.
Attorneys for
Defendant Board
Box 3330
21 Davis Avenue
Poughkeepsie, NY 12603
(914) 454-5030

ANSWER OF DEFENDANT COMMISSIONER OF EDUCATION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

AMY ROWLEY, by her parents and natural guardians, Clifford and Nancy Rowley, and Clifford and Nancy Rowley, in their own right,

Plaintiffs

ANSWER

Civil Action File No. 79/2139

- against -

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, Westchester County, and the COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants.
----------X

Defendant Gordon M. Ambach, Commissioner of Education of the State of New York, by his attorney, Robert D. Stone, Paul E. Sherman, Jr., of Counsel, answers the complaint of plaintiffs as follows:

FIRST. Denies each and every allegation contained in paragraphs 1, 2, 3, 4, 5, and 6.

SECOND. As and for an affirmative defense, joins with defendant Hendrick Hudson Board of Education in alleging each of the grounds set forth in defendant's motion to dismiss the complaint, including the ground of no standing to sue for lack of a private right of action, as if the same are fully set forth herein.

THIRD. As and for a second affirmative and complete defense thereto, that the decision of the Commissioner of Education dated April 10, 1979 which is attached hereto and made a part hereof, was fully supported by the record before the Commissioner and

was not arbitrary, capricious or an abuse of discretion.

Dated: September 24, 1979
Albany, New York

Yours, etc.,

Robert D. Stone
Attorney for Defendant -
Gordon M. Ambach
Paul E. Sherman, Jr.,
of Counsel
Office and Post Office
Address
State Education Building
Albany, New York 12234
(518) 474-1989

By: _____
Paul E. Sherman, Jr.

NOTICE OF MOTION BY HENDRICK HUDSON CENTRAL SCHOOL DISTRICT TO DISMISS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

AMY ROWLEY, by her parents and natural guardians, Clifford and Nancy Rowley, and Clifford and Nancy Rowley, in their own right,

Plaintiffs

NOTICE OF MOTION

79 Civ. 2139

v.

The BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, Westchester County, State of New York

Defendants.
----------X

SIRS:

PLEASE TAKE NOTICE that the Defendant Hendrick Hudson School District, by its attorneys Kuntz, Lewis & Spletzer, P.C., will move this Court before the Hon. Vincent Broderick, United States District Judge, on July

6, 1979 at 2:30 p.m., with opposing papers to be served and filed on June 29, 1979, in Courtroom 36, on submission upon the annexed Affirmation and Memorandum of Law pursuant to Local Rule 9(b) and General Rule 12(B) to dismiss for lack of jurisdiction over the subject matter, and the Defendants, and that the Plaintiffs have not exhausted either their state, judicial or federal administrative remedies and that there is no subject matter jurisdiction hereunder 29 USC 794, 42 USC 1983, or 28 USC 1343, nor any statutory provision for the allowance of damages or counsel fees herein, or, in the alternative, to dismiss for failure to join a necessary party.

Dated: Poughkeepsie, NY
June 18, 1979

KUNTZ, LEWIS &
SPLETZER, P.C.
Attorneys for
Defendant

Raymond G. Kuntz

AFFIRMATION OF RAYMOND G. KUNTZ, ESQ.,
IN SUPPORT OF MOTION TO DISMISS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

AMY ROWLEY, by her parents and natural guardians, Clifford and Nancy Rowley, and Clifford and Nancy Rowley, in their own right,

Plaintiffs,

v.

AFFIRMATION

79 Civ. 2193

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, Westchester County, State of New York,

Defendant.

----------X

RAYMOND G. KUNTZ, duly affirming says:

1. I am an attorney admitted to practice before the Southern and Eastern District Courts, and before the Courts of the State of New York, and I make this Affirmation in support of the Defendant's Motion for an Order pursuant to Rule 9(b) of the Southern

District, and General Rule 12(b) of the Federal Rules of Civil Procedure to dismiss the Complaint on the following grounds: 1) there is no jurisdiction over the subject matter; 2) the Defendants are not proper parties; 3) the Plaintiffs have failed to join the Commissioner of Education of the State of New York as a necessary party; and 4) the Plaintiffs have not exhausted their State, judicial or Federal administrative remedies.

2. The Plaintiffs have predicated their action on the following statutes: 1) 615 of the Education of the Handicapped Act, 89 Statute 7788, USC Title 20, Section 1415; 2) Section 504 of the Rehabilitation Act of 1973, 87 Statutes 394, USC Title 29 Section 794; 3) USC Title 28, Section 1343; 4) USC Title 42, Section 1983; 5) Section

4403(3) of the Education Law of the State of New York, as implemented by Section 200.5(c)(10) of the Regulations of the Commissioner of Education of the State of New York.

3. While a plaintiff may plead contradictory allegations to establish jurisdiction, the Complaint should set forth that fact and plead the allegations in the alternative or reconcile them in some fashion. In this pleading, that has not been done. In essence, the Plaintiffs allege that the Defendants have failed to provide Amy Rowley with a full time certified interpreter for the deaf in her classroom and thereby have denied her an education coterminus with that of her non-handicapped peers.

4. The Plaintiffs have advanced their contentions previously before

the Department of Health, Education and Welfare, before the Committee on the Handicapped for the Hendrick Hudson School District, before an independent hearing officer on an appeal from the recommendation of the Committee, and before the Commissioner of Education of the State of New York on appeal from the determination of the independent hearing officer. In each case, the agency or office found that there was no violation of law.

5. In September, 1977, the Plaintiffs filed a Complaint with the Department of Health, Education and Welfare, alleging that the School District was engaged in discriminatory conduct in violation of Section 504 of the Rehabilitation Act of 1973 for failure to provide Amy with a full time interpreter. In response to the

Complaint, HEW commenced an investigation. HEW's letter to the District dated September 30, 1977 announcing its investigation is annexed as Exhibit A.

6. On May 12, 1978, the District was notified by the Office for Civil Rights that HEW had completed its investigation of the allegations and, on the basis of its investigation, had determined that the District was in compliance with 45 CFR 84, despite the fact that it had not provided Amy Rowley with a full time interpreter. A letter to that effect from William R. Valentine, the Acting Director of the Office for Civil Rights of HEW, Region 2, of May 12, 1978 is attached as Exhibit B.

7. The Plaintiffs took no steps to appeal the determination of the

Regional Office to Washington, and no administrative review of that determination was sought, although 45 CFR 81 provides for hearings under Part 80 of that title.

8. At the beginning of the 1978-79 school year, when Amy Rowley began first grade, the Plaintiffs appeared before the School District's Committee on the Handicapped to request the presence of a full time interpreter in Amy's first grade class. On September 12, and October 3, 1978, the Committee met to consider various proofs, Affidavits and testimony presented by the Plaintiffs in support of their demand. The Committee determined that Amy Rowley was progressing satisfactorily and denied the request. The Plaintiffs sought to introduce additional proof and documentation and the

Committee met again on December 11, listened to those proofs, and reaffirmed its decision. The Plaintiffs appealed the Committee's determination to an independent hearing office pursuant to Section 4404(1) of the Education Law of the State of New York.

9. Attorney Albert P. Roberts was designated as the independent hearing officer and a hearing was held before him on December 20, 1978. The Commissioner of Education has, by regulation, made the determination of the independent hearing officer final and binding upon the parties, subject only to an appeal to the Commissioner of Education. See Section 200.5(c)(10), 8 NYCRR. On January 12, 1979, Mr. Roberts rendered a 25-page decision fully examining all of the Plaintiffs' contentions. He concluded that the

educational program provided by the District for Amy Rowley was appropriate to her individual circumstances and needs. The decision is attached as Exhibit C.

10. The Plaintiffs appealed the determination of the hearing officer to the Commissioner of Education by a notice of Petition dated February 24, 1979. The School District submitted an Answer to the Petition and the Commissioner of Education rendered a decision on April 10, 1979. In the decision the Commissioner stated, in part:

> "The witnesses who testified on behalf of the Respondent [the School District] clearly indicated that the child is progressing satisfactorily in her present placement and is considered at the top of the middle group in her class. The child's first grade teachers stated that the youngster has learned addition, subtraction, and reading since coming to her

> class, and is in fact, capable of assisting other pupils in the class. The child's other teachers and the school principal, who have been observing her on a daily basis, also agree that satisfactory progress is being made and that the presence of a sign language interpreter is not required at this time. Since the Petitioners have failed to show the present placement offered by the Respondent is inappropriate, inadequate or unsuitable, there is no legal basis to grant the relief requested."

The Commissioner's decision is attached as Exhibit D.

11. On May 8, 1979, the Plaintiffs commenced the present action. One of the jurisdictional basis asserted by the Plaintiffs is 20 USC 1415. At Subdivisions (c) that law states:

> ". . . any party aggrieved by the findings and decision rendered in such a hearing [by the independent hearing officer] may appeal to the state educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review."

The officer who conducted the review is the Commissioner of Education, who has not been made a party to the suit. In this case, the named Defendants have made no determinations. The Committee on the Handicapped is an independent entity whose members are appointed by the Board of Education. Under New York State Law, Education Law 4402(1)(b)(1), the Committee must be composed of at least a school psychologist, a teacher or administrator of special education, a school physician, and a parent of a handicapped child residing in the School District. The Committee makes recommendations to the Board of Education, but its recommendations may be appealed to an independent hearing officer, and pending that appeal, the child must remain in the present

educational placement. Under the Regulations of the Commissioner of Education, 8 NYCRR 200.4(d)(4)(ii) deaf children must receive a minimum of one hour instruction by a certified teacher of the deaf, five days per week. The Committee's recommendation was that Amy Rowley continue to receive that instruction and the services of a certified speech instructor three times a week. Amy Rowley received such assistance all through the 1978-79 school year. No member of the Board of Education served on the Committee on the Handicapped, and its determination is completely independent of the School Board. The hearing officer's determination was independent, as was the decision of the Commissioner of Education.

12. The Plaintiff's only basis for jurisdiction is 20 USC 1415. The

other jurisdictional allegations are spurious. The Rehabilitation Act of 1973, 29 USC 794, has no application to elementary education or to the Plaintiff's complaint. In order to bring an action predicated on 28 USC 1343, the Plaintiff must allege an amount in dispute in excess of $10,000. No such allegation has been made. In order to bring an action under 42 USC 1983, the Plaintiffs must allege deprivation of a Constitutional or legal right through state action. No such allegation has been made.

13. The Plaintiffs have invoked federal procedures through their appeal to the Department of Health, Education and Welfare, then abandoned them, then invoked state procedures, and now appeal to the federal court from the state procedures, without having exhausted those procedures.

Although not dispositive of the issues, the Plaintiffs have previously argued before this Court that the Commissioner of Education is not a necessary party to this suit because the federal action is in the nature of an appeal from the Commissioner's decision, but the only statute under which they can premise a federal action, 20 USC 1450, clearly states that the Commissioner's decision is "independent" and therefore stands in place of all previous decisions. Under Section 310 of the New York State Education Law, the Commissioner's determinations are fully dispositive of any action taken by the local Board of Education, and for the purpose of Section 1415, the Commissioner stands in the place of the School District. The School District is not a proper party to the

action, since it is not the School District's determination which is being reviewed, but the Commissioner's.

14. In the State law implementing the federal policy, Education Law 4404(3), the Commissioner's determination "may only be reviewed in a proceeding brought in the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules." It is the Commissioner's decision which is reviewed under the state statute, not the School District's or the independent hearing officer's. In this Motion, the Defendants urge the Court to find that no jurisdiction exists because the Plaintiffs have failed to follow that statute, or in the alternative, to abstain from jurisdiction on the ground that the state courts

are fully capable of determining the Plaintiffs' claims. But it is quite clear no matter what alternative is adopted, that it is the Commissioner, and not the School District, who should be defending the Commissioner's independent decision. The School District should not be a party to the action, except if it asks for permission to appear in an action against the Commissioner of Education.

15. It is respectfully requested that the Court dismiss the Plaintiffs' Complaint on the grounds recited, or in the alternative, abstain from invoking its jurisdiction.

16. The foregoing is duly affirmed under the penalties of perjury.

Dated: June 18, 1979

Raymond G. Kuntz

EXHIBIT A TO KUNTZ AFFIRMATION - LETTER FROM HEW TO HENDRICK HUDSON CENTRAL SCHOOL DISTRICT DATED SEPTEMBER 30, 1977

September 30, 1977

Dr. Thomas J. Jenkins
Superintendent
Hendrick Hudson School District of Peekskill
61 Trolley Road
Montrose, New York 10548

Dear Dr. Jenkins:

This is to inform you that we have received a complaint which we consider to be of an emergency nature alleging that the Hendrick Hudson School District is engaged in discriminatory conduct in violation of Section 504 of the Rehabilitation Act of 1973 because of failure to provide Amy Rowley with the necessary related services needed to afford her an equal educational opportunity.

Frank D. Cedo, Equal Opportunity Specialist, spoke to you on Tuesday, September 20, 1977 to review the principal issues of the complaint, and was advised that our office was welcome to visit the Furnace Woods Elementary School to observe the situation, and to discuss specific particulars with the school's Principal, Dr. Joseph Zavarella. Mr. Cedo called Dr. Zavarella on September 26, and made arrangements to meet with him on September 27.

Because particularly prompt action appears warranted in this case, we shall investigate whether or not a violation of Section 504 has occurred within 60 days of receipt of the complaint. If in fact a violation has occurred, we will seek corrective action through negotiations with your school district. In the event that we are unable to secure an appropriate remedy within 120 days of receipt of the complaint we shall initiate formal enforcement action 30 days thereafter by commencing administrative proceedings or referral of the complaint to the Department of Justice.

This office is committed to a timely and efficient resolution of this matter. We are therefore requesting that you send us the following information no later than 15 days after receipt of this letter:

1. What is being done to specifically address the unique educational needs of the complainant's daughter?

2. As a related issue, How were the educational needs of this student assessed?

3. What short range and long range plans do you have for assuring that Amy Rowley will be afforded a free appropriate public education? Please review Sections §84.33 - §84.35 with regard to procedures for complying with Section 504 of the Rehabilitation Act of 1973.

We appreciate your cooperation in this matter. If you have any other information you wish to submit that may help in this investigation, or if you have any questions concerning this matter, please do not hesitate to contact us. Mr. Frank D. Cedo, Specialist, has been assigned to handle this case. He can be reached on 212/264-9374.

Sincerely,

Nilda I. Koenig
Chief, Elementary/Secondary Education Branch
Office for Civil Rights

EXHIBIT B TO KUNTZ AFFIRMATION - LETTER
FROM HEW TO HENDRICK HUDSON CENTRAL
SCHOOL DISTRICT DATED MAY 12, 1978

In reply, please refer to:
Case #77-0112

Mr. Charles V. Eible, Superintendent
Hendrick Hudson School District
61 Trolley Road
Montrose, New York 10548

Dear Mr. Eible:

The Office for Civil Rights has completed its investigation of the allegations of violations of Section 504 of the Rehabilitation Act of 1973, filed by Clifford and Nancy Rowley against the Hendrick Hudson School District.

On the basis of our investigation, we have determined that the Hendrick Hudson School District is in compliance with 45 CFR 84 as it relates to the education of Amy Rowley, daughter of Clifford and Nancy Rowley.

Thank you for your cooperation in this matter. If we can be of assistance to you at any time, please do not hesitate to contact us.

Sincerely,

William R. Valentine
Acting Director
Office for Civil Rights, Region II

AFFIRMATION OF MICHAEL A. CHATOFF, ESQ., IN OPPOSITION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

AMY ROWLEY, by her parents and natural guardians, Clifford and Nancy Rowley, and Clifford and Nancy Rowley, in their own right,

Plaintiffs

- against -

The BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, Westchester County, State of New York,

Defendant.

----------X

AFFIRMATION IN OPPOSITION

Civil Action File No. 79/2139

MICHAEL A. CHATOFF, affirming under pain of perjury, says:

1. I am the attorney for the plaintiffs in the above-entitled action and I am familiar with the proceedings therein.

2. I make this Affirmation in opposition to the defendant's motion to dismiss, dated June 18, 1979.

3. As is more fully explained in the attached Memorandum of Law, various of the motions set forth by the defendant are asserted inappropriately under Rule 12(b) of the Federal Rules of Civil Procedure.

4. This court has jurisdiction over the subject matter; all jurisdictional bases set forth in the plaintiff's complaint are correct and appropriate.

5. There is no party that should be joined under Rule 19, F.R.C.P., that has not been joined.

6. At this juncture, a discussion of the facts in this case is not warranted. Because a 12(b)(6) motion has not been presented, no discussion on

the merits would be appropriate until after issue is joined. However, a brief statement about the degree of review to date may be helpful. By letter of May 12, 1978, the Office for Civil Rights made it clear that it did not and could not make any educational judgments concerning Amy Rowley. See Exhibit A. The propriety of the review of the defendant's committee on the handicapped and the hearing officer, appointed by the defendant, is discussed in the plaintiff's petition to the New York State Commissioner of Education. The comparison, attached hereto as Exhibit B, suggests the scope of review conducted by the Commissioner.

7. The defendant has offered a potpouri of motions, most of which are not proper under Rule 12(b), and none

of which come even close to being on target. The Memorandum of Law of the defendant is replete with errors of law. The motions are a thinly veiled attempt to delay this case, despite the fact that the attorney for the defendant stated in Chambers that he agreed with my assertion that "time is of the essence."

WHEREFORE, it is respectfully requested that:

1. the motions herein be denied in all respects;

2. the defendant be required to file an answer immediately, pursuant to the court's authority under Rule 12(a);

3. costs of this motion be taxed against the defendant; and

4. the court impose any penalties against the defendant that it may deem proper.

Together with such other and further relief as to this court may seem proper in the premises.

MICHAEL A. CHATOFF
Attorney for Plaintiffs
192-05 Radnor Road
Jamaica, New York 11423
(212) 464-7622

Dated: Jamaica, New York
June 26, 1979

DISTRICT COURT ORDER DENYING MOTION TO DISMISS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

AMY ROWLEY, by her parents and natural guardians, Clifford and Nancy Rowley, and Clifford and Nancy Rowley, in their own right,

79 Civ. 139 (VLB)

Plaintiffs

- against -

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, Westchester County, State of New York,

Defendant.
----------X

VINCENT L. BRODERICK, U.S.D.J.

Defendant's motion to dismiss the above-captioned action is denied.

Pursuant to Rule 19(a), Fed. R. Civ. P., the Commissioner of Education of the State of New York shall be joined as a party defendant. Plain-

tiff shall, within ten days from the date of this order, serve and file an amended complaint joining the Commissioner. Plaintiff and defendant, respectively, shall serve upon the Commissioner a copy of all papers filed by each of them in this action, and plaintiff shall advise the Commissioner of the date set for the hearing on plaintiff's motion for a preliminary injunction.

SO ORDERED.

Vincent L. Broderick,
U.S.D.J.

Dated: New York, New York
August 22, 1979

TRANSCRIPT OF DISTRICT COURT
PROCEEDINGS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
79 Civil 2139

----------x

AMY ROWLEY, by her parents and natural guardians, Clifford and Nancy Rowley, and Clifford and Nancy Rowley, in their own right,

Plaintiffs,

-against-

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, etc., et al

Defendants.

----------x

Before:
HON. VINCENT L. BRODERICK
District Judge

New York, September 26, 27, 28, October 5, 1979

NANCY ROWLEY - TESTIMONY [71]

Q What is your name?

A My name is Nancy K. Rowley.

Q What is you occupation?

A My occupation is a housewife and a volunteer community worker.

Q What is your relationship with Amy Rowley?

A I am the natural mother of Amy Rowley.

Q Are you a teacher of the deaf?

A Yes, a certified teacher of the deaf.

Q Would you state your educational background and experience with deaf children?

A My educational background in early years was growing up in a private school and I attended Gallaudet College where I received a

degree in economics and my master's in education of the deaf. And I've taught deaf children in the State of Pennsylvania and in New York.

* * * [73]

Q How often do you work with Amy on her school work?

A I work with Amy about one hour each day and I think many parents do work with their children, give supplemental work for their children.

* * * [74]

Q What did Amy say to you when she came home from school on April 25th?

* * * [75]

A On April 25th she came home from school very unhappy and confused. She said, "Mommy, please tell me I'll still be in school."

* * *

CLIFFORD ROWLEY - TESTIMONY

* * * [93]

C L I F F O R D R O W L E Y, called as a witness by the plaintiffs, being first duly sworn, testified as follows through the sign language interpreter: DIRECT EXAMINATION

BY MR. CHATOFF:

Q What is you occupation?

A I am a research chemist working for a company called Lanza, Inc. in Fairlawn, New Jersey.

Q What is your relationship with Amy Rowley?

A I'm her natural father.

Q Were any portions of the program designated Exhibit No. 7 at the hearing on December 20, 1978 added or amended at your request? That is the program that the school district designates as the IEP for 1978-1979.

A No.

Q Were you provided with an opportunity to provide any input in the drafting of that program?

A No.

Q And as far as the IEP prepared by the school for 1979-1980, were any portions of that program added or amended at your request?

A No.

Q Were you provided with an opportunity to provide any input in the drafting of that program?

[94]

A No.

Q As far as Amy is concerned, this school year does she have a teacher of the deaf or a speech therapist?

A No, she doesn't have it

this month. Since the school year last year?

A Yes.

[94]

* * *

DR. ANN BARBARA KLIGERMAN-TESTIMONY

Q Please state your name.

A I am Dr. Ann Barbara Kligerman.

[95]

Q And what is your occupation?

A I am chief of the speech and hearing center at Westchester County Medical Center. I am an audiologist by profession, practicing audiologist.

Q Please tell us about your educational background and experience with deaf children and deaf people.

A First of all, for my education, I have a doctorate of education granted to me by Teachers College, Columbia University in

audiology and speech pathology in 1978. I have a master's degree in audiology and speech pathology granted in 1962 from Syracuse University and a bachelor's degree in 1961, also from Syracuse University, magna cum laude.

I've taken postgraduate courses in workshop. I am presently the chief of the Speech and Hearing Center. Among my duties are doing pediatric audiological workups, hearing aid consultations, planning and participating in treatment programs for deaf infants and their parents, counseling of parents and their families, all rehabilitation and hearing aid orientation for children and adults. I participate in multidisciplinary conferences and act as consultant for educational planning for hearing-impaired children.

* * *

[101]

Q Is Amy Rowley deaf?

A Yes. Amy is deaf.

Q Please tell us something about the tests you conducted to determine that Amy Rowley is deaf.

A Okay. Before I spoke in generalities. Now I'll speak in specifics.

One way to see that Amy Rowley is deaf -- well, the first way, according to my definition, is that the hearing impairment precludes --

MR. KUNTZ: I object. He asked her what tests she conducted. It seems to me that that is not the answer that she is giving.

THE WITNESS: I'm giving the definition of deafness and now I will list the tests.

MR. SHERMAN: May we have a ruling from you?

THE COURT: Yes. Wait until I've ruled, when there is an objection.

The question is what tests you did to determine whether or not she was deaf.

THE WITNESS: Okay. The test consists of a pure tone sensitivity test, speech reception test and speech discrimination tests.

The pure tone test indicates that Amy, although [102] she hears the very, very lowest frequency at 250 hertz, at the level of between a mild and moderate impairment, once you go above that into the speech frequency range her hearing level is at the best 80 dB to 90 dB in each ear at 500 hertz and

continues to worsen until there is no longer any responses for either ear beyond 4000 hertz.

In other words, her hearing sensitivity, the softest sound she is able to hear in the speech frequency range is at the level between 80 and 110 decibels, probably beyond that, which puts her in the range of being deaf, classifies her, categorizes her as a deaf child. Okay?

The speech detection thresholds are considerably better than one would expect, but that is reflecting the better hearing at the very, very low frequency of 250 hertz. When you come into speech understanding, whereby she has to repeat the word -- the speech detectio.. nly her raising her hand that she has heard some sound. The

sound that is being delivered are words, but she is not understanding them.

When she is asked to repeat two-syllable words, she is not able to do this in either ear until it reaches the intensity level of 85 to 90 dB. Remember, normal hearing, a normal hearer would hear around 15 dB.

And for the speech sound discrimination, that

[103]

test -- we have many different test scores for it because, as we tested Amy using the test materials that are available to us for speech sound discrimination, her discrimination improved, and the reason it improved is because we were using the same test over and over and she really learned what was on that test.

MR. KUNTZ: Your Honor, I

object. This is to the point now where it is just a narrative without questions, and the question I think that was asked is "What tests did you give her?" We now have an interpretation of this test coupled with an explanation for the variances.

It seems to me that we have got to proceed in some sort of order, asking questions and getting responses.

THE COURT: All right. Let's not go back but attempt to keep your answers responsive to the questions, please.

THE WITNESS: I guess we have to use speech discrimination because that is a measure of understanding speech. You are asking me if she is a deaf child.

MR. KUNTZ: I don't know

what the question there is.

THE COURT: There is no question pending now.

A question, please, Mr. Chatoff.

MR. CHATOFF: I am asking Miss Kligerman to

[104]

explain the tests performed on Amy Rowley. I don't know as much about tests --

THE COURT: You are now being asked to explain the tests. Will you explain the tests that you gave to Amy?

THE WITNESS: I would like to go to the speech discrimination tests because that is --

MR. SHERMAN: I am going to object to the form of the question. It is too broad.

THE COURT: Overruled.

THE WITNESS: The speech discrimination tests are to determine how well one discriminates speech. I did this in several different ways with Amy. One way is to do it without her hearing aid, without any amplification. Without any amplification at all, Amy's speech sound discrimination is very low. This has been shown in the Gallaudet test results as well as mine.

Then we put on her hearing aids, and depending upon which test you use, you get a different score. With both hearing aids worn at the same time, on the WIPI test, which has been mentioned before, the most recent score we got on A-y was 80 percent. Now, that may sound very good, except I would like you to know that this

 [104]

test consists of Amy identifying one out of six pictures. It is a closed set. It is not just saying words where she has no reference.

[105]

The pictures are right there and she has been given this same test at our center and at Gallaudet Center over a period of two years.

Therefore, I switched to a test she had never taken, and I switched from my own speech, which Amy is very familiar with, to a tape, a commercially available, calibrated standardized test recording of the Goldman, Fristoe, Woodcock test -- discrimination test, and with both hearing aids she scored a 73 percent, which puts her, compared to normal hearing children, in a very low percentile. If I could look at my

notes, I could tell you what percentile it is, but I don't know if I am allowed to do that.

You know, she is just like in the 7th percentile. A normal hearing child -- a seven-year old normal child would understand a hundred percent of those words. But with her hearing aids on she only scored a 43 percent. And when she put noise into this system, because the test is also --

MR. KUNTZ: Your Honor, I have to object. The problem with this kind of narrative is that now we get different information. First it is 73 percent. Now it is 43 percent. It doesn't enable me to consider the information that I'm getting in relation to a question that is asked. It is a very difficult way to proceed. I understand the problem

that we are trying to address by proceeding in this

[106]

way, but I wonder if we might break it up occasionally with a question so that I know what the answer is in response to.

THE COURT: She is explaining the various tests which were being used. At the present time she is explaining the tests that were given with Amy having both hearing aids on at the same time.

MR. KUNTZ: Did she refer to the WIPI test at this point?

THE COURT: No. She said on the WIPI test she got 80 percent. Then she moved to something else.

And was this also the WIPI test?

THE WITNESS: No. I

mentioned it. I said the Goldman, Fristoe, Woodcock Auditory Test of Discrimination. That was the test using a tape rather than my voice.

THE COURT: You said that it was 73 percent then and then you mentioned 43 percent.

THE WITNESS: No, no. It is 43 percent.

THE COURT: Not 73 percent?

THE WITNESS: No, no. I'm sorry. Shall I go on?

THE COURT: Yes.

THE WITNESS: With the same test, but a different list of words, when you put noise into it to try to

[107]

simulate the classroom situation, which is very difficult in a test situation, if you put noise into it, her discrimination score deteriorates

to 27 percent, which is as good as chance, because this is also a picture identification test. There are four pictures to a page, and she has to pick out the one that is presented, at a normal intensity level.

Then we wanted to see what happened when we provided visual information, what happens to Amy's discrimination when you allow her to see you lips. So we used the Utley Lip-Reading Test. She had both hearing aids on, she could see my lips, and she scored a 58 percent. That means out of 31 sentences - such as "good morning--I'm giving you examples of the kind of things on the test -- "good morning. How are you? What is your name? Do you want a cup of coffee?" - she scored 58 percent.

When we repeated the sentence,

when we did it a second time, she was able to improve her score to 84 percent. When Mrs. Rowley was asked -- allowed to present the sentences at the same time, and this was a different set of sentences, using sign language, Amy scored 100 percent.

I am not supposed to give any interpretations. Those are my most recent test results.

Q Are you finished?

A Yes.

Q Continue.

A Well, I don't know -- you know, I finished giving my test results.

THE COURT: The last question has been answered. Next question.

Q I would like to know when you started testing Amy Rowley.

A In 1974, May. That was the first time I saw her.

Q In the ensuing five years have you coordinated your testing with testing at the Thornberry Clinic at Gallaudet College in Washington?

A Yes. I knew Amy was going to Gallaudet the first time for the learning vacation. They routinely test their children there and I always maintained communication with them over -- to see, to verify, it is nice to have a second opinion about test results, any changes and that kind of thing. In fact, I have TTY transcriptions of conversations, which I don't have with me. But that's how we communicated as well. I have all their reports. They have all of mine.

* * *

Kligerman - Direct [109]

Q You were discussing before the Utley Lip-Reading Test. You stated that Amy understands 58 percent when she uses amplification and lip reading.

What effect would there be on that 58 percent

[110]

figure if she is not familiar with the contents or the lighting is poor, there is background noise, group discussion rather than a one-to-one discussion, and a person with poor articulation or poor facial features?

What would be the effect?

A That score would go down. Her ability to discriminate speech comprehension would definitely go down in those adverse conditions.

Q What you are saying is that Amy at the very maximum understands 58

percent --

MR. SHERMAN: I am going to object to the form of the question as to what she understands. She can testify to her opinions based on a hypothetical question, but I haven't heard that. I haven't heard anyone ask that.

Q It is your opinion that 58 percent represents her maximum --

MR. SHERMAN: Objection. He is leading the witness. He can ask her if she has an opinion and then she can give it. He is leading the witness, your Honor.

THE COURT: Do it that way.

Q What is Amy's maximum comprehension level and what effect would there be on that comprehension level if any one of several conditions did not exist?

MR. SHERMAN: I object to the form of the

[111]

question, you Honor. That question does not make sense. What are the factors involved?

THE COURT: If he puts the factors in, you will then object that he is leading the witness.

MR. SHERMAN: He can give a hypothetical.

THE COURT: He need not give a hypothetical. We are in federal court. He need not give a hypothetical.

What in you opinion is the maximum level of comprehension which Amy has achieved?

THE WITNESS: That depends on what you are giving her. If you are doing it by -- only letting her

hear what you want her to repeat back and discriminate, then it is going to be very, very poor. If you are going to let her see visual clues, only speech reading and hearing, it is going to be better, let's say 50 to 60 percent. But that, of course, also depends upon the lighting in the room, the way -- I speak very easily for someone to read my lips; not everybody does -- whether or not someone has turned away, whether she is familiar with your way of speaking, whether she knows the context in which you are talking. If you give her a page with pictures to point to, it will be easier than saying, "Okay, repeat the word 'ash'," out of the clear blue sky. So there are lots of things that go

And if you are giving her a toatal communication approach, where she is hearing and seeing your lips and reading the signs, then she is going to be able to discriminate and repeat back and understand what you are saying to the level of her mental ability.

* * *

Kligerman - Cross

* * * [137]

Q Does the WIPI test that you administered test word comprehension?

A That depends on what his definition of

[138]

"comprehension" is.

Q Well, let me go back, because you agreed with me, I think, during the initial questioning that you pay particular attention to words and to their meaning. And in the report that you submitted you said that the WIPI test measured speech discrimination. Is that correct?

A That's correct.

Q I asked you, and I'll ask you now, is there a distinction between speech discrimination and comprehension of speech?

A Yes, there is.

Q Now, the WIPI test, did that measure speech discrimination or did it measure language comprehension?

A It measures comprehension.

Q Would you tell us how it measures comprehension and what you mean by "comprehension" in that context?

A Because the child has to (1) be able to discriminate --

Q I'm asking you for a definition. It may be a textbook definition, it may be your own definition, but it is a definition.

How do you define "comprehension" as you have used it in that context?

A Comprehension is the understanding of the

[139]

language.

Q Just prior to this you told me that there is a distinction between comprehension and speech discrimination and that the WIPI test measured speech discrimination. Are you now telling us that the WIPI test measures comprehension?

A The WIPI test measures comprehension, which includes discrimination.

Q Is discrimination a subset, to put it mathematically, of the word "comprehension"?

A This is something that has been argued in the books over many years. It is very difficult to separate out discrimination from comprehension and comprehension from discrimination, and that's why their discussion becomes so difficult.

Q It would seem to me, then,

test, as you stated in your report, of speech discrimination would atttempt to utilize that end of the spectrum of the controversy, would it not, to focus upon word discrimination? There must be tests, Dr. Kligerman, that measure word comprehension, aren't there?

A Yes.

Q What tests are those, by the way?

A You have other kinds of tests in speech

[140]

language pathology --

Q What tests measure word comprehension?

A Vocabulary tests, the picture vocabulary test, the Peabody picture vocabulary test.

Q Would a school test measure

vocabulary comprehension?

A I'm not familiar with your school tests.

Q Would a schoolbook vocabulary test measure comprehension?

A Yes.

Q So consequently, if one were to do well at a school vocabulary test, one could then be said to have a good understanding or good word comprehension, is that correct?

A I guess you could.

* * *

MARTIN L.A. STERNBERG-TESTIMONY [152]

Q Please state your name and occupation.

A Martin A. L. Sternberg is my name. I am a professor at New York University, at the Deafness Research and Training Center.

Q Please state your

educational background and experience in the education of deaf children.

A I am a graduate of the City College of New York with honors in English and have a Master of Arts degree from the American University in Washington in the field of communications and I am expecting to receive my doctorate in about two more months in the area of deafness rehabilitation from New York University. [153]

I have been working for the last 31 years in the area of deafness rehabilitation, deafness education and work with deaf children who have learning disabilities in addition to their deafness, and I have also written extensively in the field and I am the author of 21 books and articles on the subject of my interest.

Sternberg [153]

But my prime concern is communication insofar as it pertains to deafness.

One of the sub-areas of my interest touches on communication with interpreters, like we have before us. One of my ocntributions to this field is a standard curriculum for the training of interpreters. This is used throughout the United States as a standard reference.

I served or continue to serve as a consultant to approximately 15 schools for the deaf. In addition, I have been for the last five years an educational consultant to the Texas Education Agency, involved with the evalution of their ongoing curriculum for the deaf children of that state.

I am also a member of the Board of Trustees of St. Francis de

Sternberg [153]

Sales for the deaf in Brooklyn, New York.

* * * [154]

Q Please define "total communication."

A Total communication is not merely a method of communication but rather a philosophy of communication. Its primary consideration is the individual deaf child and his or her educational needs. The philosophy behind total communication mandates that the individual child's specific needs be accounted for in the design of a program for that child's education.

This can but does not necessarily include the following: oral communication, which means speech and speech reading with or without auditory amplification; writing on the

Sternberg [154]

blackboard or on paper; finger spelling and one or another form of sign language. All of these together we call total communication.

Q I think it would be helpful if you explain the difference between sign language and finger spelling.

MR. SHERMAN: Your Honor, I am going to object

[155]

to this line of questioning as not in any way relevant to the matter before you. We are talking here about the educational placement of a particular child. It is clear to me that we are now about to get involved, apparently, in a debate between total communication, and we have heard it before, oral communication.

This is not the forum for such a debate. Again, the Commis-

sioner of Education was concerned with the education of this particular child.

THE COURT: I will overrule the objection, Mr. Sherman.

MR. CHATOFF: Can you repeat the last question?

(Question read.)

A Finger spelling consists of 26 separate and discrete positions of one hand. Thus the letter A is indicated by the thumb placed against the closed fingers. The B, the thumb is placed against the palm with the four remaining fingers sticking up in the air, and so forth. Then the alphabet has a specific hand position.

Finger spelling is used for the purpose of providing a visible equivalent to the English language or any language, for that matter, by

providing a letter-by-letter continuum, showing what the word looks like on the

[156]

fingers. As opposed to finger spelling we have sign language, which today is a broad rubric describing one or another of various systems' gestural language which might pertain to ideas and concepts, phrases, sentences, individual words and so forth.

As an example, when we make this movement (indicating) involving the closed fists moving back and forth in rhythm, obviously we are referring to some kind of an activity. In this particular case we are talking about driving a car.

Many of the signs we use are eyechanic, meaning they describe the shape of the idea.

On the whole, the sign language today is used for the purpose of providing a visible method of expressing. It can be used isolated or, in the case of total communication in conjunction with spoken language. When it is used with spoken language, we have what we call total communication.

* * * [ ]

Q What effect does the use of total communication have on camaraderie and interaction between deaf children and hearing children?

A Total communication, because it involves sign language, in a classroom context, for example, will sensitize hearing children to the needs and special requirements of deaf children. Through becoming sensitive to these needs they will be more

 [159]

responsive to an understanding of the specific nature of hearing loss.

Hearing loss per se is not a visible disability. It is invisible. A deaf person on the street cannot be identified as, for example, one can identify a person with cerebral palsy or a paraplegic. Because we cannot identify

[160]

visibly a disability, we sometimes lack understanding. Thus, by the introduction of total communication we make deafness visible and therefore we achieve a joint step forward toward empathy and understanding.

* * * [167]

THE COURT: Do you know Amy Rowley?

THE WITNESS: Yes, your Honor. I spent Tuesday night for

hours with the child.

Q Please tell us which papers you reviewed.

A If my memory serves me correctly, I have

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received the Davila affidavit, the one by Deninger, by Mary Sheie, several reports from the audiological department at Gallaudet College, and one or two from the Westchester County Medical Center, and have them all in my briefcase, approximately nine documents.

Q Are you aware of, do you know of, the recommendation of the Committee on the Handicapped?

A Yes.

Q In your opinion, does Amy need an interpreter in her classroom?

A Most definitely, yes.

Q What do you think about the present arrangements?

A I think that is a sad commentary on a school system that it would permit a situation whereby a so-called mainstreamed child is receiving the equivalent of one hour a day of special assistance from a resource teacher, three hours a week of speech therapy, and the remaining six hours a day with no supportive services whatsoever.

Sternberg - cross

* * * [171]

BY MR. KUNTZ:

Q Dr. Sternberg, you told us that total communication is a philosophy of approach. Is that correct?

A Yes.

Q I take it that when you characterize it as a philosophy, it is not then a method.

A Correct.

Q As a philosophy, has it received unanimity of acceptance among educators of the deaf?

A Since its introduction approximately 15 years ago, 50 percent of the schools for the deaf have adopted it and the number continues to increase steadily.

Q If there is a parallel philosophy or another philosophy, what is that other philosophy called or how is it named?

[172]

A I would say how is it named. It is not a philosophy. The others are called methods. We have an oral method, the combined method or the simultaneous method. They go by all kinds of specialized jargon, but they are all methods of actual presentation in a communicative sense. They are not philosophies, however. Therefore, there are no others that are called philosophies per se.

Q Are you then telling us that there is no oral philosophy?

A Not in the same sense as there is a total communication

philosophy. We are talking now in terms of semantics.

Q Yes, we are. And I wonder if you aren't reluctant to dignify the other approach with the nomenclature of philosophy and by that device downgrade its importance.

A No. Such is not the case, because the total communication philosophy obviously was introduced as a philosophical construct involving other methodologies, namely the oral, the manual and the combined together with written communication and auditory amplification. All of these are per se methods.

The premise behind the total communication

[173]

approach is a philosophical one insofar as it would encompass all of

these other methodologies. I did not mean to imply I was trying to downgrade any one or another of the previously mentioned methods.

Q Is there any situation under the total communication philosophy where you have a profoundly deaf child where a sign-language interpreter or an interpreter would not be absolutely required in the classroom of a first-grade child?

A Not to my knowledge, sir.

May I amend that remark?

Q You described the interpreter as a communicator.

A Yes.

Q In a classroom situation, is the interpreter a conduit for information?

A Yes.

Q As a conduit for information

--

A Yes.

Q -- does the interpreter impart the meaning of the information which is transmitted?

A Yes.

Q Dr. Sternberg, if the sign-language interpreter were to finger-spell a Spanish word and there was no

[174]

child in the classroom, deaf or hearing, who understood Spanish, how would the sign-language interpreter communicate the meaning?

MR. HARTZMAN: Would you repeat that question?

(Question read.)

A Assuming there was a need to do so, and assuming that the interpreter was familiar with the

Spanish language, the interpreter would then offer a simple translation of the word in English.

Q That is not my point, Dr. Sternberg. My point is that the interpreter is not a teacher but merely a communications device. Do you agree with that?

A Yes, I do.

Q Have you ever visited Amy Rowley in her kindergarten, first grade- or second-grade class?

A No, I have not.

Q When was the last time that you were in a mainstreamed primary school classroom for the purpose of observation?

A Approximately four years ago.

* * * [177]

Q Well, if the philosophy is

that communication must be established, would it not follow that signs or signing would not be necessary when the child can orally understand what is being communicated?

A Again I do not understand the thrust of that question. I am confused.

MR. SHERMAN: Your Honor, do you understand that question?

THE COURT: I am not on the witness stand. The witness says he does not understand the question.

MR. SHERMAN: Yes, your Honor.

MR. HARTZMAN: Would you read just the last couple of lines of that question?

MR. SHERMAN: I'll withdraw that question.

Q If a child fully understands

what is being orally communicated, a deaf child, would it not follow that

[178]

signing is not only unnecessary but distracting to the child?

A No. May I elaborate on that?

Q No.

THE COURT: No.

Q (Continuing) What purpose would the sign language serve in that case?

A In that particular case, none. But there are many variables involved. The child may have been coached by rote to comprehend a certain sentence.

Q Thank you.

Isn't it true that in some cases that signing, or sign language, could act as a distracting influence?

A No.

* * * [180]

Q Why was your meeting arranged the way it was rather than having you observe her in a classroom?

A My meeting was a social meeting with Amy. It involved her parents. We happened to meet at a social function and thereafter we went out for ice cream and then I had opportunity to communicate with her.

Q Did your meeting with her that way have anything to do with not wanting to make her feel that she was constantly under observation by someone?

A Yes, very much so. My work with young children has made me very cautious during the observation process. I try to be as discreet as possible, and so I seized this

opportunity to use a social occasion to observe

her so that she would not be aware that she was being observed.

* * *

TARAS DENNIS-TESTIMONY [95]

Q Please state your name and occupation.

A I am Taras B. Dennis. I am a guidance counselor at the New York School for the Deaf in White Plains, New York.

Q Please recite your educational background and experience in the education of deaf children.

A I have it all on my resume. Can I read it?

THE COURT: Very well.

Q Tell us just a little about your education.

A I got my BA from Gallaudet College with distinction in 1950, my MS from Hunter College in 1963, my MA from Columbia University in Special Education in 1971, and an Ed. M from Columbia University in 1973.

MR. CHATOFF: I would like this resume marked in evidence.

(Plaintiffs' Exhibit 22 marked for identification.)

MR. SHERMAN: No objection.

MR. CHATOFF: I move the resume be received.

[194]

MR. KUNTZ: No objection.

THE COURT: It will be received.

(Plaintiffs' Exhibit 22 was received in evidence.)

Q I would like to read a statement to you from federal legislation that is now before Congress, the Department of Education Organization Act, printed in the Congressional Record of Friday, September 21, 1979.

MR. SHERMAN: I don't

understand what is going on. Is he asking the witness something about that?

THE COURT: Not yet. He is going to read a statement from it and then presumably ask the witness a question about that statement.

MR. SHERMAN: I see.

THE COURT: Proceed, Mr. Chatoff.

Q "Among the findings written into the legislation, finding No. 3, 'Parents have the primary responsibility for the education of their children and states, localities and private institutions have the primary responsibility for supporting that parental role."

I would like your opinions and views on the substance of that quote.

A Well, as I see it and I read it in good English, I support it very much because my job in the

[195]

School for the Deaf now is connected with working with the parents, and I notice that the deaf children with the least worries are those who have parents with the most worries. And so I really firmly believe that when a parent is involved in a deaf child's education good things can happen.

Q Are you saying that parents and schools have to work together?

A Absolutely. There is no better way.

Q Do schools have to support the decisions made by parents on how to raise their children?

A I would say so.

Q Tell us about your personal

knowledge of Amy Rowley.

A Well, to be honest with you, I have taught her husband, who was my former pupil in the School for the Deaf in White Plains and I keep good track of all my former students and I know Amy very, very well. I know that she has a brother and I've practically been in their home many times socializing and I've seen the child grow up there.

Q I think you've covered it, but Amy is now seven years old. How many years have you known Amy?

A Well, I wasn't exactly there when she was born, no. But I could say from that point on I've known her

[196]

all her seven years.

Q What is your opinion of

Amy? What do you think about her?

A A beautiful, bright child, and with her personality -- well, excuse me for a minute. I'm very involved with children myself, and when Amy sees me I play a lot with her. We tease each other. She is really very, very bright and she has a lot of potential.

Q What do you think about the way Mr. and Mrs. Rowley have raised her?

A I have no complaints. I think they are perfect, ideal parents for her. They are always concerned with her future. I've never seen any two parents more interested in their child like Mr. and Mrs. Rowley.

Q Have you reviewed any records, any school records of Amy's?

A Yes, I have.

Q What records?

A I have a list in my jacket, if I may read it.

Q I would like you to read it.

A Well, I've read the report from Gallaudet College of the audiologic clinic of February 20, 1979; the report from Gallaudet College audiologic clinic of April 24, 1978; the report from the Westchester County

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Medical Center Speech and Hearing Clinic, June 22, 1978; the recommendation of the Committee of the Handicapped of the Hendrick Hudson Central School District; and I've read some evaluations by Mrs. Gloverman and Miss Sue Williams and Miss Garzione. And also I read a February 2, 1979

observation by Miss Mary Sheie, a February 15, 1979 observation by Mr. Michael L. Deninger, and an excerpt from the 1979-80 IEP prepared by the Hendrick Hudson Central School District for Amy Rowley.

Q In your opinion, does Amy Rowley need an interpreter in class?

A Absolutely.

* * * [198]

Q Can you see any detrimental effects on Amy if the present arrangements are continued?

A Well, I've always believed the most important years of a deaf child are when that child is very young. It is important to start the right first step. So maybe while she is young Amy will not have many problems at first. But as time proceeds, the gap of communication

Dennis - Direct [198]

gets further

[199]

and further apart and problems that could be social, cultural, psychological, not just academic, start to set in.

TESTIMONY OF NORMAN DOCTOR

* * * [241]

Q And under what circumstances did you see her?

A Mr. Cortez and I rode up to the school. We sat and talked with the principal for a while, went in to observe her in her classroom, and observed her in a reading lesson with a group of children and the teachers. Then we sat and we talked with her for a little while and went back to the office and reviewed the educational materials that were in the child's folder.

Q Did you sit and talk with her in the classroom?

A Yes, we did.

Q When you first arrived at the classroom that Monday, what did you see when you first entered the

classroom?

A We saw Amy Rowley sitting at a table with the teacher, a reading lesson going on. I observed that the child was seated with the window to her back, which is important in terms of working with a hearing-impaired child. The light from the window was on the other students and was not shining in Amy Rowley's face in terms of blocking her

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ability to lip read.

The child was using an auditory training unit. The microphone from the auditory training unit was passed to the other students as they read from the story.

Amy, from all observations, was keeping up with the reading lesson and participating fully with the other

children.

Q When you say that she was participating fully with the other children, would you describe what you saw and observed?

A Okay. Again, she was watching both the book and the children when they were reading and keeping up with the reading lesson. After the reading lesson was finished, they were preparing to go to lunch, and Amy stopped to talk with her friends, she was interacting very nicely and very easily with the other students before they went to lunch.

Q Did you have a chance to observe her at any other time?

A Other than after the lesson was finished, when Mr. Cortez and I were speaking with her?

Q Yes. Would you tell us -- I

meant to ask you, would you tell us what transpired or what occurred when you and Mr. Cortez spoke to Amy?

A Mr. Cortez and I just had a general conversation

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with her, asking her questions about school, asking her about various objects in the room. Basically we were trying to get an impression of her speech and language abilities and of her signing abilities.

Mr. Cortez -- and I need to specify this -- signs, but he is not an interpreter. This was a very primitive screening that was taking place, not an evaluation.

One of the things that we did was I asked Amy to attend to me while I told her a little story, and I had Mr. Cortez sit close by and he

signed the story at the same time that I was telling her the story.

Amy attended to me as the speaker rather than attending to Mr. Cortez while he was signing, and at one point, when I intentionally went very fast, to see if I could confuse her, she stopped me and asked me to repeat what I said rather than looking at Mr. Cortez, who was signing, to see if she could catch it through the sign language.

And also I have to specify that the language we were using was very simple conversational language.

Q From that brief experiment did you draw any conclusions?

A I would have to say that it is very difficult to draw any conclusions in terms of the issues that are

taking place here. Whether in fact Amy would have been able to follow in an instructional lesson with new vocabulary being introduced as compared to the simple conversation that we were having, I could not testify. I would certainly have to mention that Amy is a good lip reader. We tried various things, moving around the room, speaking to her from about 20 feet away. She has good lip-reading skills and I believe, from that small observation, that she can function aurally within that classroom and would attend to the teacher when the teacher was speaking. But it was a very primitive screening evaluation.

Q When you say that Amy could function aurally in that classroom,

does Amy receive any other clues besides those provided from her attention to the teacher's lips and through the FM wireless as to what the meaning of a particular spoken phrase is?

A In terms of the auditory oral communication?

Q Yes.

A Okay. Yes.

Can I just explain some aspect of auditory oral communication?

Q Please do.

A Auditory oral communication does not mean that a deaf child just receives communication from the movements

[245]

of the lips in isolation by itself. It also does not mean that the child uses the residual hearing that he or she has just by itself. I mean that

the child uses the hearing, the residual hearing that she has plus watching the lips, plus watching facial expressions, the context of the situation that is taking place.

There are all kinds of visual and auditory stimuli that are helping the child interpret the language and figure out the situation that is occurring.

It is my belief that Amy can function adequately and appropriately in that manner.

I also have to add, on the basis of the audiogram that I was shown -- I don't want to get too technical, but Amy has a good island of residual hearing in the low frequencies. All sounds are divided into frequencies. The vowel sounds, which are the sounds that are most

difficult to lip read because they are not on the surface of the lips, are the sounds that she is most likely to hear. The high-frequency sounds, which is where her most severe part of her hearing impairment is, are the sounds that would be most easy, easiest to see. So that in terms of using her residual hearing and using her lip-reading ability, based on the audiogram and based on my impression of Amy, I feel that she would be able to function appropriately in an auditory oral approach. [246]

* * *

* * * [253]

Q When you observed Amy in class, that was Monday, the 17th?

A That is correct.

Q September 17th?

A Yes. I don't know my dates. What was this past Monday?

THE COURT: The 24th.

THE WITNESS: I'm sorry. September 24th.

Q The 24th? This week?

A Yes, this past Monday.

Q When did you review the records of Amy Rowley?

A At the time that we were at the school.

Q How long did your observations last?

A Twenty minutes.

Q The observation lasted 20 minutes. How long did the conversa-

tion with Amy Rowley last?

A Ten minutes.

Q You met with Amy with a Mr. Cortez. Was total communication used at that time?

A Are you talking about by me or by the classroom teacher?

Q When you met individually with Amy, Mr. Cortez, Amy and you, was total communication used during the

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discussion?

A I'm not sure I would agree with total communication being used. I don't think I would define it that way.

Mr. Cortez, who I mentioned before, is not an intepreter and as far as I know is not proficient in sign language, did sign to Amy for part of the discussion.

TESTIMONY OF ED CORTEZ

* * * [271]

CROSS EXAMINATION

BY MR. KUNTZ:

Q Mr. Cortez, on what do you base that opinion?

A Could you just remind me of which opinion?

Q You just testified that in your opinion Amy does not require a sign-language interpreter in the classroom at this time.

A Okay.

Q And I would like to know the basis of that opinion.

A Okay. There were several things in both the information that was presented to the Commissioner and to the impartial hearing officer and information in the records and things that occurred during the observation

that helped me come to that opinion.

I think foremost in my mind was the statement by the interpreter that Amy had, and this comes from the documentation of the impartial -- I believe the Commissioner's appeal. He stated that Amy did not attend to him when the teacher was speaking and when he was interpreting for the teacher. There was a man by the name of Mr. Janik. And I

[272]

have to -- in the entire thing, he said that he did not feel that an interpreter was needed and that he was not serving any real function in that particular situation. I am paraphrasing, but that was basically what he said.

So that is really foremost in my mind, and that is one of the

things. I have to assume that he knows what he was talking about and that as an interpreter of the deaf he had a basis on which to come to that conclusion.

The other thing that indicated to me that the placement was appropriate was the fact that she appears to be doing well according to all the records that were in her file, well for a first grader either hearing or deaf. Her report card shows that she had received either excellent or good during the past year. The SAT scores, the Metropolitan scores, they all pointed to a child who was succeeding very well in that particular setting.

In terms of the observation, I saw nothing to contradict that. The child did not appear to lose track of

what was going on during the time that we observed her. During the reading lesson she followed the -- excuse me. This is somewhat distracting. Is it possible to pass that around?

Q I'm sorry. I am sorry that you were interrupted.

[273]

A During the course of the observation, she in fact was able to follow the directions that were given to her in terms of when to read. She was very much aware of where they were in the reading lesson. She was able to begin on cue. She read at a normal pace, with good volume and good intonation.

I observed her after the lesson, and after the lesson she was told to go back to her desk. Actually, the group was told to go

back to their desks. The children went back to their desks.

A kind of interesting thing happened after that. They were told to put away their books and get ready to go to lunch, line up to go to lunch.

Now, you would expect a child, any child in that kind of situation to just get up and go to lunch. And that's kind of something that children are cued to do. In this case, however, Amy interrupted the teacher and asked the teacher if she could, instead of getting ready for lunch, finish her written lesson, and the teacher sort of chuckled and said, "Yes, you may, if you can do it quickly." And Amy promised to finish before the other children were ready. The other children proceeded to put

their books away, start lining up, and in fact by the time they all lined up, Amy had finished her lesson, put her books away and had gotten in line. [274]

So that it was a matter in which the specific direction of the teacher was being countered -- in other words, Amy was assertive enough and understood enough what was going on to counter that direction, asked if she could do something else, and then proceeded to do it, and essentially fulfilled her part of the deal, which was to finish on time and be ready with the other children.

Q As a result of your review of the records and your observation in the classroom, would you say that the district's approach of mainstreaming this child, with the supportive services that were in place and are to

be in place by virtue of the recommendation of the Committee on the Handicapped, make this a successful second-grade program for this child.

A I would anticipate that it would be a successful second-grade program for the child.

MR. KUNTZ: Thank you. I have no further questions.

* * *

Q Are you certified as a teacher of the deaf in New York State?

A I am CED certified.

I'm sorry. That's not correct. I forget

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whether it is CAID or CED certified. It is Council of American Instructors of the Deaf or Council of Educators for the Deaf. I forget what it is.

Q I don't know what the abbreviations mean. What does CAED stand for?

A CAID is Council of the American Instructors of the Deaf. And CED is Council of Educators of the Deaf.

When I graduated from Western Maryland College, it was a program that would lead to

 [287]

certification within one of those, and at the time I graduated I received a certification.

MR. KUNTZ: Your Honor, I wonder if we might inquire of Mr. Chatoff how long he is going to be. I made previous commitments upon our agreed-upon schedule of 4:00 o'clock.

THE COURT: All right. I think we will adjourn at this time and continue with the cross examination of Mr. Cortez on Wednesday at 10:00 o'clock.

* * * [291]

Q Mr. Cortez, when we recessed on Friday you stated that you

[292]

have certification from CIAD.

Do you know Dr. Robert R. Davila, the immediate past president of CIAD?

MR. SHERMAN: I am going to object to this, your Honor.

THE COURT: Overruled.

A Your statement is incorrect. I said CAID. And in fact, the certification that I am referring to is CED. Certification, Council on Education of the Deaf.

I went home after the testimony and pulled it out. It is, as I said, CED certification. I received it in September of 1973.

Q Then am I correct in assuming that you do not have CIA certification?

A No, I do not believe I have that, unless it is complementary.

I am not sure what you are referring to in terms of CID certification or CAID.

Q As far as CED certification

is concerned, is your certification provisional or professional certification?

A My certification is Type A, temporary certification. In fact, I called Dr. Rly Stelle in Tucson, Arizona, this past week to check on the status of my certification, and he indicated that professional permanent

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certification would be forthcoming as soon as I sent verification that I had taught in the School for the Deaf.

I also have New York State certification in the area of deafness.

Q Are you certified by the Commissioner of Education of the State of New York?

A Yes, I am.

Q When did you obtain that certification?

A I applied for that certification back in March --

Q I did not ask when you applied for it. I asked when you received it.

MR. SHERMAN: May I have the question reread?

(Question read.)

A Okay, I have confirmation that it has gone through just this past week.

* * *

DR. JOSEPH ZAVARELLA-TESTIMONY [341]

Q You referred to her score in listening comprehension. I believe you gave the score as 5.7. What does that mean?

A It is a grade equivalent, as to the other, and it means that she scored at an equivalent of fifth grade, seventh month.

MR. CHATOFF: No further questions.

THE COURT: I think you are going to have to

[342]

explain that to me.

Obviously, Amy does not listen. Will you tell us what listening comprehension has tested?

THE WITNESS: I see the contradiction in that, your Honor, but listening comprehension with Amy would

be through visual means. Rather than saying the word, the word was signed. See, she received a clue from the teacher, and the youngster then has to respond by selecting the appropriate symbol on this paper. By receiving the signing clues, she then responded on the paper. That was the listening comprehension.

TESTIMONY OF ANN MULHOLLAND [342]

A N N M U L H O L L A N D, called as a witness by the defendant school district, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KUNTZ:

Q Miss Mulholland, what is your present

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occupation?

A I am associate professor of education at Teachers College, Columbia University. I officially retired as of August 1979, but since there has been no replacement for me, I am currently employed on a part-time basis.

Q As a professor at Columbia, do you deal in a specific area in any specific aspect of studies?

A Yes, my specialization for almost my entire professional career has been the field of deafness, and specifically education of deaf children and adults.

MR. KUNTZ: Might I have this document marked for identification.

(Defendant Board of Education Exhibit 7 marked for identification.)

Q Miss Mulholland, I show you what has been marked as District Exhibit 7 for identification. Please tell us what that document is?

A It is my vitae up until a couple of years ago. It is not up until the last minute.

MR. KUNTZ: In lieu of asking Miss Mulholland about her background to any great extent, I

would submit this vitae in evidence.

(Pause.)

THE COURT: No objection, Mr. Chatoff?

MR. CHATOFF: No objection. [344]

THE COURT: Exhibit 7 will be received.

(Defendant Board of Education Exhibit 7 received in evidence.)

Q Would you briefly state for the Court your background, just touching upon your educational degrees and your experience?

A Having lived a long time, I have acquired a few degrees in the process. I have a Bachelor's degree in education, Bachelor of Science in education, a Master of Education, with emphasis on secondary school, a Master of Arts and Audiology earned at

Northwestern University, a PH. D in educational psychology from Fordham University, and an un-picked up list of credits, something like 36 credits in guidance and counseling from Loyola University in Chicago.

In addition, 18 or more credits in measurement, which began early on in my teaching career and was obtained in such universities as Harvard University and Boston University.

Q Would you briefly state your teaching experience?

A I have taught in a day school for the deaf for a few days short of 20 years. I opened up and developed

[345]

a guidance program in that school for the evaluation and counseling of

hearing-impaired children and their parents. I operated a guidance clinic at Northwestern University in conjunction with Dr. Helmer Michael Butts. I also operated a nursery program there. I have studied with Michael Butts, particularly his work in psychology of deafness and his techniques of assessing deaf children and counseling both deaf children and their parents.

I presently, in spite of working five days a week instead of six or seven, I presently ran a program where we evaluate, at the request of parents, deaf children to determine the adequacy of their educational placement and to provide direction for their educational programming. We see children from infancy through young adulthood.

In addition, I am partly

responsible this year for the Master's program in preparing teachers of the deaf. I am relinquishing some of my responsibilities for the doctoral programs in education of the deaf, but I am still advising on dissertations.

Q Miss Mulholland, have you had occasion to see Amy Rowley in a classroom setting?

A Yes. I did visit the classroom. I think it was on September 28th.

Q And approximately what time did you arrive at

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the School?

A I know I was in the classroom by 9:30 and I left the school close to 11:30.

I observed Amy in class and also in the lunch room.

Q Please describe for the Court your observation of Amy and the circumstances under which it took place.

A I observed Amy in a spelling test, a spelling lesson and a math lesson and in a social situation. Even a little bit of physical activity. That was in the classroom.

I made an effort, if I may look at some of my notes, I made an effort to jot down some of the language which she was using in the classroom situation.

First of all, the room was properly lighted so that there were no shadows being cast on the face of the speaker. There was adequate lighting for -- in almost every section of the room. The acoustics of the room was satisfactory. The arrangement was

such that there were rows of tables -- I think there were four rows of tables with about five children in each row. Amy sat between two boys in the front row, in a position which for most of her work would probably be considered advantageous.

The teacher was wearing her microphone. I was impressed with the manner in which the teacher

[347]

operated her classroom. Her strategy, her teaching style is somewhat formal; that is, she requires the children to work efficiently -- as efficiently as possible, and to work quietly, and to respond to questions.

It was my judgment that the spelling test was quite well handled --

Q Miss Mulholland, let me

interrupt. Was the spelling test the first thing you observed?

A That's right.

Q Would you describe that for us, please?

A The teacher said the word from a list of about 10 words, put the word in a sentence, and then repeated the word. Her diction was -- I have a note under this, "Clearly stated." There was no problem as I observed it.

So the first word was "jump," another word was "fun, have, must, bus, cup, gun." She had no trouble with "bus." From what I could see she had no difficulty, and the last word was "from." Because I think they were in context she knew what the word was.

Q Are you saying that you observed Amy specifically in this

spelling test?

A Yes, I watched her responses, I watched the teacher giving her the stimulus, giving her the words, the

[348]

sentence and repeating the words and also her writing the test.

Q Did you come to any conclusions as a result of those observations?

A I felt she was having no difficulty at all in responding to the teacher's words.

Q Would you tell us what you next observed?

A Do you want the lesson?

Q I want it as complete as possible.

A I was pleased to see that while the teacher was going around

checking all of the spelling tests, making sure that everyone was all right, Amy decided to do a little playing. So she took her pencil and put her pencil on her lip and she said to the little boy next to her, "Look at my tongue." Pretty soon, several of the boys around her were playing. This didn't seem to me to be any problem at all.

The papers, I should say, were being collected by the teacher. So this was very natural. She was talking with the children next to her.

Q I was going to ask you, did that exchange have some significance to you?

A Yes.

Q Would you tell us what that significance was

or is?

A First of all, she was not having any difficulty in communicating with the children, either receptively or expressively, and that the children had no difficulty in understanding her. In these situations I observed she had no difficulty communicating.

Q Would you tell us what you next observed?

A I next observed the spelling lesson and I was concerned and paid close attention to the language of the classroom teacher in order that I could determine whether or not Amy was having difficulty. And I was surprised that the teacher used language which was appropriate, the instructions were not too complicated. She did use such a sentence as, "Be sure that we have it

all done." Her language was good, her voice was okay, and she did give commands like, "Circle the "a" sound."

Amy performed and I had not interrupted the class at that time. I was still in the background. And she also was able to respond for a word called "snerks." They were referring to some of these words as s-n-e-r-k-s. These words are snerks, the teacher said. Amy said, "It is a snerk," with proper intonation.

Q As a result of that interchange between Amy and the teacher did you come to some conclusion about Amy?

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A Yes, and in the math lesson as well, I felt that Amy was a fortunate child to have such -- to be in such an educational setting where

the teacher was extremely sensitive to her needs, made sure she understood what was going on. At the same time when at one point Amy was a little disruptive, she put her foot on the foot of the boy next to her, and the teacher reprimanded her. She was being treated properly in that situation.

Q Would you tell us what you next observed?

A The next lesson was on arithmetic. That was very interesting to watch because Amy did so well on it. It was good. Amy had freedom to go to different parts of the room. After they had had their little exercises when the teacher did give some directions, they proceeded to work on math. Amy turned to the boy next to her and said -- to the teacher

and said, "We going to do math?" She might have said, "We are going to do math," but I didn't hear it. I put down, "We going to do math?" It was properly intoned to be a question. Looking at the book she said, "We are going to do math." She was making differentiations between the way she spoke her sentences, indicating to me she was not simply repeating; was not giving off automatic language but producing language about which she was thinking.

Now, the task was --

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Q Excuse me. Was it your testimony she was not giving off automatic language?

A Automatic language would be like the way we talk, "Good morning, how are you," and we respond, "How are

you." I felt she was generating this language. I'm not trying to say automatic language is bad but she was thinking about what she was saying. Some idiomatic expressions might be automatic and those are appropriate. But in this instance I felt she was generating sentences.

The teacher's directions for the accomplishment of this task were good and sometimes a little lengthy. She said, "We are going from the apartment house to each place on this graph," which was blocked off. The children were to find the shortest distance in response to oral questions. We want to find the shortest way. We are lazy. We want to go to the drive-in. How many spaces will be the shortest way to the drive-in?"

Q Are you saying what the teacher's instructions are?

A Yes. "How many blocks did they go?" Amy's hand was first up and she said, "I think I know" and she did know. Throughout all of that she was first to complete the task and she was finally called upon to help some youngsters who were not doing so well on this task.

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Q How did that occur?

A The teacher was behind her, working with a boy who seemed to be having difficulty with the instructions. By the way, each section of the test or each task was introduced by the teacher in the front of the room properly placed. Then she moved around the room to see those who were not solving the problem

accurately.

So she was about three rows behind Amy when she called Amy by name and invited her to come and help this boy who was having trouble.

Q What happened as a result of the teacher's request?

A She called, "Amy," and Amy turned right around. When the teacher said what she wanted her to do, she came right over. As a matter of fact, I think she realized, with the teacher standing there, here was a boy who needed help.

She used language to her neighbor boy, "That's east," when most of the children I heard were having trouble figuring out east and west. One expression she used is, "You are not supposed to do that." Then she used what is truly an intonative

question, "I was smart." Another expression was, "You forgot."

Q Did the use of those expressions have significance

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to you?

A Yes. It seemed to me that for a deaf child with her loss, that she was functioning very well, receptively and expressively, and that she had good knowledge of the structure of language and that she was able to use a variety of sentence forms in a spontaneous manner in a real situation, not a contrived one. I am referring specifically to the questions to the teacher and her relationships to the children.

Q What did you next observe?

A I think about this time -- at one point Amy did say, "What did he

say?" She was trying to find out from the boy next to her what did he say. She was repeating to him, "What did he say?" That was again in a proper question form.

The teacher said, "He said six and he is not right." So this is the kind of conversation that was ongoing.

The next thing that occurred was they had a task to perform which required them to find other names for four, five, six, eight and ten, which was a written task and we would call that a coding task. That was a very interesting thing to see, the manner in which they worked. There was a chart on a page of their arithmetic book and they had to perform certain small simple mathematical problems or

computations, but they had to color them. So the answers had to be color-coded. She operated, I thought, in a very logical manner in that she selected all of those answers which required yellow crayon, and she began to fill in the yellow, color in yellow.

Q Did her response to that test have some significance to you?

A I think she was doing very, very well in math or math concepts. I felt she was not having difficulty in understanding directions.

Q What next did you observe?

A Well, at this time I observed the work of a number of the children because I did not want Amy to think I was there to observe her, to make her uncomfortable. So I requested permission of the teacher to

move around the classroom. This I was able to do. So I was able to see Amy work at close hand and all of the other children as well.

Finally, it was almost time for their lunch and so they were getting themselves ready for lunch, and Miss McLaughlin came to the table where I was then sitting and I just complimented her on what a nice class she had.

Suddenly, Amy came from the group where she was across the room and she sat on Miss McLaughlin's lap.

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She picked up the microphone and she was playing with the microphone and Miss McLaughlin. Miss McLaughlin said, "Don't do that," and she stopped.

She had on a little T-shirt

and I asked her what it said on her T-shirt, and she said, "Pomotah, P-o-m-o-t-a-h Beach, Maine." But she replied properly.

In the middle of this T-shirt was this beautiful red lobster. I said, "What's that?" She said, "It's a lobster." Then she described how she had eaten two lobsters.

She also began to play with Miss McLaughlin's hair, and in no time flat I was commenting, first, on names and the similarity between Miss McLaughlin's name and mine, which she had asked me to tell her. Then she came over and she began to play with my hair. She patted it and she talked about liking grey hair. So apparently -- whatever intrigued her, I don't know.

Q Did that exchange have some significance to you?

A I thought it revealed, first of all, that she and her teacher have excellent rapport and that she respects her teacher and her teacher has great respect for her and cares about her learning academic work, but also about her social behavior and about her feelings. From that point of

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view I thought this situation was superb.

I have evaluated and gone in to see a great many children in different classroom settings in several states, and I can't say that at seven years of age I have seen any child being so comfortably and gracefully accepted and given the

attention she needed and wanted at a given point in time.

I felt that the language she was giving off, producing, was spontaneous language. The structure was excellent. I saw no difficulty. The speech was good, really very intelligible.

Q Did you have a further observation of Amy?

A Well --

Q Did you observe Amy in the lunch room?

A Yes. I did go to the lunch room but I went after the children were seated so that I would not be intruding in another situation.

Q What did you observe there?

A I observed Amy having a conversation with two children, one across the table from her, one to the

right and the children communicating with her. There seemed to be no difficulty at all in the relationship, which was extremely exciting to me. There was no isolation.

Q Miss Mulholland, in your opinion and based upon

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your observation of Amy in the classroom, is she being provided an appropriate and adequate education?

A In my opinion I have not yet seen any school system provide what has been provided in this situation. I was very pleased about that.

In the particular educational situation in which she is, I think she is doing very well. I see the emotional state being cared for, her personality, her acadamic needs. All of this have been attended to by a

caring teacher. She might not be the most dynamic teacher in the world, but she is a person who relates beautifully to children and has a formal, organized class. So it is a teacher-directed class, and that's her basic strategy.

Q Let me show you what has been marked as Exhibit No. 4 on behalf of the school district, and ask you to take a look at that.

(Pause.)

A Yes.

Q Could you tell us what that is?

A This is the Metropolitan Achievement, Primary 1, Form G, and bears the name of Amy, with her scores.

Q What does the Metropolitan test measure?

A It varies according to the levels. But at this point it is checking on reading and arithmetic concepts

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and computation.

There are three parts to the reading: word knowledge, word analysis, and sentence reading, story reading, and then the mathematical concepts and the simple computations. The proper computations for that level, of course.

Q Is this a nation-wide standard test?

A Yes, it is.

Q Would you take a look at the back of the test which shows the scores?

A Yes.

Q In your opinion did Amy do

well on this test?

A Yes, I would say she had done well. Grady equivalent rank from 2.1 to 2.5, which placed her anywhere from the 78th on reading, 84th percentile on word analysis, and 86th percentile on word knowledge, which I would think is good.

Q I would like to show you what has been marked as School District Exhibit 3 in evidence. Could you tell us what that is?

A This is the Stanford Achievement Test, Primary Level 1, Form A. This is, too, is a basic test on reading, word study skills, what they call math concepts, and computations.

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Q Is this a standard national test?

A Yes. By the way, the Stanford tests have excellent validity and reliability. This is a very solid test.

And in the literature in the field of deafness we have used the Stanford widely, and there is a considerable liturature on older forms and emerging on some other forms.

Q Would you take a look through the subtests as they are scored in the booklet itself and tell us whether Amy performed well on that test?

A The first one on vocabulary, she tested 32 out of 37 correct, which put her at a grade 3.3 level. On reading of words here she scored 34 out of 45 correct, which gave her a 1.9 grade level. A second test of reading using sentences, she scored 41

correct out of 42, and earned a 3.5 grade level, a score of 3.5 grade level. On the word study skills, that apparently was not administered, and on the mathematical concepts, which would be number facts, she was -- excuse me, that is identifying such things as numbers, like 3, 4, 5, what's the next number, but there are no directions with it because you just know what to do. On that kind of test she scored grade 4.0.

On the mathematical computations she scored

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31 out of 32. which gave her a grade level of 4.5.

Now, on the listening comprehension, I'm not sure how the teacher gave that test, on that score she did score 5.7, and she had 25 out

of 26 correct.

Q Miss Mulholland, based upon your observations and your investigations into the education being provided for Amy Rowley, in your opinion is a sign-language interpreter required in Amy's second-grade classroom?

A In my considered judgment, there is no need at this time for a manual interpreter. I do not preclude that being a valuable asset in the future, but at this time I do not see that she needs an interpreter.

May I give the reason for that?

Q Please do.

A One of the reasons is that I am looking at Amy as an individual child in a particular educational setting. And in that setting which I have described as formal and

teacher-directed, I'm not sure what an interpreter would do. Because Amy is free to turn around and talk and she is communicating and there is no intermediary through whom she must go. She relates directly to the children, she relates directly to the classroom teacher and to all of those with whom I saw her in contact.

It may be as the work becomes more complex it

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would be valuable for her to have a manual interpreter.

Q Do you mean at second grade or future grades?

A I would say in future grades.

I would think at this point she is developing some social skills with her peer group and she is

comprehending and expressing herself in language that is excellent, and I think she is doing just beautiful.

Q Might a sign-language interpreter in a classroom prove harmful?

A It could.

Q Would you tell us how it could?

A I don't know that anyone has ever studied this. All right. Maybe I will illustrate.

When Amy came over to where Miss McLaughlin and I were sitting and talked in a very gentle way with Miss McLaughlin and was curious about me and my name and we were communicating, she climbed up on Miss McLaughlin's lap. If she had an interpreter I'm not sure what would have happened. Perhaps Amy would have said, "May I

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sit on your lap? Or what's her name?" I could not see that an interpreter would have a particular role in that situation because it is a formalized teacher situation.

Q Would the presence of an interpreter inhibit Amy's development in some fashion in that classroom?

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A Well, in the instance I have just been describing, a second individual or third individual not part of the communication system might be considered intrusive. "Might be" I said.

I think what I am trying to point out is there isn't much incidental that is going on that the child is not already involved in.

* * *

Q Miss Mulholland, in your experience what is necessary or what skills, rather, should Amy have now or be acquiring now to assist her in future progress or development?

A At this age probably one of the most important skills that she is learning is how to read and to develop the many skills that one -- subskills which one must have in reading.

Q Why must she acquire those kinds of skills?

A Certainly reading widens the horizons of all of us, and for deaf children, deaf persons, the ability to read well is extremely important. Psycholinguistically an individual develops through reading considerable comprehension, understanding of the language structure, learns about subordination of ideas. I could go on

with many of

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those skills.

Since she already has a good start in language, since she already is learning sentence structure, or rather, the structure of the language itself using a variety of forms, probably the chief learning is that of reading, being highly competent in reading.

She is well on the way to that according to the reading tests which she has had.

Q In her particular case would the acquisition of those skills be enhanced in any way at the present time by the presence of a sign-language interpreter in the classroom?

A In my opinion that is not

necessary now.

Q Why is that?

A I think basically there is little congruence or consonance between signs, or sign language, rather, and written English, and I think that since she is already showing good progress in reading that such an additional support system may not be necessary at this time, is not necessary at this time.

Q Would you describe for us the prevalent or predominant theories of education of the deaf and describe for us the schools of thought by their common names or in some fashion that would assist us in identifying the

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major philosophical attitudes toward education of the deaf.

A First of all, I would like to say that my coming here as a

witness is in support of Amy as a deaf child. I am not here to argue the merits of one system or any system over the other. My only function here is for that purpose.

However, if it would help to understand, I will quickly -- for those who are not experts in the area of deafness, then I will be pleased to express it.

Q Please do.

A Essentially there are, in strictly layman's terms, there are two kinds of systems, two approaches using different communication modes. One stresses manual communication. That generally is using signs. Since we have acquired such a considerable amount of information on linguistics, linguistic knowledge has been applied to some systems, so we have sign

English and other kinds of systems. These are manual, but they more closely follow standard English.

Another approach to learning is through, historically what is called an oral approach. Now, that term predates the use of electronic amplification systems and is basically a system of instruction or an approach to instruction using speech reading and speech.

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What is available today for deaf youngsters and was not available 25 or even 30 years ago is the auditory-oral approach, which emphasizes the employment of residual hearing, both personal hearing aids and group units in the classroom, which provide for most deaf children a means of developing a language system

which is using auditory cues. So that their oral-expressive language is enhanced through the use of improved stress patterns, improved intonation, etcetera.

Receptively, there appears to be some relationship between comprehension and the use of auditory cues, such as pausing, etcetera.

Q Would you explain that, please? Just briefly. I am not asking for a technical explanation but one that would assist us in this trial.

A Let me give you an illustration. Children can learn to disambiguate sentences like: She fed her pet goldfish, or she fed her pet goldfish, through auditory cues.

Now, it is clear that we are talking about early use of

amplification in infancy, early use by the parents of hearing aids, helping the children to develop their auditory receptive repertoire.

This kind of approach has, with a tremendous number of deaf children, been most successful, and I would

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suspect that a number of the person who are young deaf people coming along in a variety of fields, have had that kind of exposure.

Now, auditory-oral education then is using as much of the cues or as many of the cues auditorally to enhance speech reading, because profoundly deaf children are primarily visually functioning and they will be speech reading. So we are not trying to make deaf people hear. We are

trying to enhance their reception of language through the use of residual hearing. But the primary mode is a combination of speech reading and listening.

I could give a lecture but I don't want to do that.

Q Is it this approach that, generally speaking, is being used with Amy at the present time?

A I would say that's true in the school situation, yes. Based on my observation, that's what it was and she was making good use of her residual hearing.

Q When you say she was making good use of her residual hearing, what do you mean by that?

A She has good intonation patterns, she has quite good articulation, but she has -- she is

hearing a great deal, of course, in the low frequency, so she is capable of hearing all the vowel sounds without any amplification

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Consonants, she is missing out on some of the high-frequency consonants, but through training there is information which will facilitate her acquisition of language when she has -- maybe I had better start all over again.

Through these auditory cues she is improving both her receptive language and also her expressive language.

Q Now, in the course of your preparation for this testimony did you have a chance to review the audiological reports and audiometric tests that were performed on Amy?

A Yes. She does show --

Q I was going to ask you what do those tests show, again in general terms?

A I don't have it in front of me --

Q I can show them to you if you would just wait for a second.

A All right.

THE WITNESS: The one I have is 1976.

Q I am going to show you what has been marked as Exhibit 1 for identification. Take a look at that (handing).

I would also like to show you what has been

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marked as Exhibit 21 (handing).

A Is it possible for me to go back one step?

Q Certainly. Please do so.

A As you could tell, I was losing my train of thought. I indicated to you there were two primary modes of communication -- approaches. I said manual, I said auditory-oral, and I said pure oral, which is without electronic amplification. I did not proceed further, and I should have, that there is -- there are two other methods. One is the simultaneous method, which is used at Gallaudet College, which is widely used. There is also the Rochester approach, which includes finger spelling and speech. Then there is a philosophy of total communication which includes all possible communication modes, which would include the use of amplification, speech reading, speech

and also manual communication, which can be both finger spelling and signs.

Q I will direct your attention now to Exhibit 1 and Exhibit 21. Could you tell us what those exhibits are?

A Exhibit 1 is dated February 20, 1978, and is a summary of a hearing aid check. The second one is dated April 24, 1978, and is a summary of a hearing aid evaluation.

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Q Are those audiological reports showing residual hearing?

A Yes.

Q What do they show?

A They show that Amy has considerable residual hearing in the low frequencies. She was tested at 250, and since that is so high it varies between 20 and 30 dB. One

would postulate that 125 was even higher.

At 500 frequency she has about a 75 dB loss in one ear, greater in the other.

On this one she has an aided threshold of 45 dB.

Q When you say "this one," what is that?

A This is the Gallaudet College clinic on February 25th. She has an aided speech awareness threshold, which means she is aware speech is going, at 45. Using amplification she has a speech reception threshold, which means she can make some discriminations, between 55 and 60 dB, which would be in the moderate range on the aided threshold.

Using vision and audition, she scores speech discrimination at

about 55 -- excuse me, 76 percent, I'm sorry. At 76 percent using vision and audition. Her aided threshold, using just audition alone, appears to me 16 percent. So she is getting a considerable amount of information

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combining audition and vision.

Q In terms of Amy's classroom, in an unaided state, what does the audiological report show?

If I can put that another way to you, what sound information is Amy capable of receiving in her classroom in the unaided mode?

A Well, she certainly is hearing vowels; that is, she is hearing first and second foiment. And as we know transitional foiments also carry a great deal of information. She is able to perceive not at far

distance, but at close distance, she is able to perceive vowel sounds unaided. As a matter of fact, that is common in using it as a hearing check with little children.

Q You used a word I am unfamiliar with. That foments?

A F-o-i-m-e-n-t. First foiment and second foiment. That's a way of acoustically analyzing speech sounds, examining their frequency or pitch and their intensity or loudness. All of the phonemes, the vowels and consonants of the English language, or other languages, too, can be plotted against an audiogram and we can -- we know what youngsters are capable of hearing by employing our knowledge of foiments and what a child is capable of receiving.

For example, we use one technique, which is plotting an audiogram against a phonogram. I do this with a great deal of students. It shows where a child's or an individual's reception of a sound falls in terms of frequency and intensity.

So you can plot if a child can hear an O or an A.

Q Do these tests show that Amy can receive assistance from electronic hearing supplements?

A Yes.

Q And how do the tests, specifically the tests you have in front of you as exhibits, demonstrate that?

A Well, it shows the difference between her aided scores and her unaided scores. It shows what

she is capable of perceiving and of recognizing.

She had a speech awareness threshold, which means she could just tell that speech was ongoing, that is the 45 dB; she had a speech reception threshold at between 55 and 60 dB when they use responding words.

Now, the test situations generally use words, not necessarily running speech, certainly at young levels, young ages.

And she was tested also at one time on the auditory training unit she had, and she earned a discrimination

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score of using audition alone of 36 percent. So that that means she has learned to process a good bit of information, speech sounds, using

hearing along. You see, in the very low frequencies she has close to normal hearing.

Q When Amy is hearing speech or seeing speech on the lips in a context such as a classroom with which she is familiar, is her perception likely to be greater than in a test situation?

A Oh, yes.

Q Why is that?

A Well, for one thing she would be both speech reading and listening at the same time in the classroom; whereas she would be, in a test situation, be tested on listening alone, just listening.

Sometimes children are tested using taped words so they don't see even the human face when they are being tested. I don't know exactly

that that was done here. I didn't recall it said that.

Q When students are tested using a tape, how does that impact the results as against a test which would be conducted in context?

A It is an objective measure, if you will. But with children it is not that -- it is useful in helping you to determine how much value the child is -- or how much

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improvement the child has made in developing listening skills or in responding to audition alone. It is more difficult to listen to a tape. It would be testing, then, audition, not the combination of speech reading and listening, which is what we advocate with children.

* * *

Mulholland - Direct [374]

Q Miss Mulholland, on the basis of your review of the documents and records in this case and on the basis of your observation of Amy in the classroom, is the district's program of providing Amy with a mainstream classroom setting, with supplementary services, which include the use of the FM wireless auditory system, the services of a speech therapist three times a week, and the services of a certified teacher of a deaf one hour a day, an adequate and appropriate program for the education of Amy Rowley?

A In my judgment, yes, at this time.

MR. KUNTZ: I have no further questions.

* * * [380]

Q You testified that Amy

Rowley's speech is good, that her language is spontaneous, and that she has proper intonation or inflection.

Do you know if Amy Rowley was raised using total communication?

A I understand that that is so. I would compliment her parents on having given her a tremendous personal support, whatever that might have been, because she is a special child. She is not at all passive. She relates well to people. And sufficiently aggressive to be good to see.

DONALD F. MOORES-TESTIMONY [402]

Q What is your name and occupation?

A Donald F. Moores. I am head of the Division of Special Education and Communication Facilities at the Pennsylvania State University. I am a professor of education of exceptional children and a professor of speech pathology and audiology.

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Q Please tell us something about your educational background and experience in the education of deaf children and in the psychological aspects of deafness.

A My educational background, I have a Bachelor's degree in psychology from Amherst College in Amherst, Massachusetts; a Master of Science Degree in education of the deaf from

Gallaudet College in 1959; I have an MA degree in special administration in the area of deafness from California State University of North Ridge, as part of the leadership training program in the area of the deaf; I received my Ph.D in education at the University of Illinois in 1967, with an emphasis on deafness, learning theory and psycholinguistics.

My teaching background --

Q Have you written any books or articles on the subject of deafness?

A I published a book last year entitled "Educating the Deaf, Psychology, Principles and Practices," which was published by Houghton, Mifflin.

I have finished this week a long-term study on preschool programs

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for deaf children which will be published by the American Speech & Hearing Association, monographs.

I have published 20 research monographs on

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the area of deafness and I would think approximately 60 or 70 publications related to various aspects of deafness.

* * * [407]

Q How would you characterize, categorize total

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communication?

A There are two definitions or two distinct approaches to the term "total communication." I believe Dr. Mulholland referred to both of them.

One is the idea of total communication as incorporating all

aspects of communication, depending upon a situation. So within that context we would have total communication in this room. With visual displays, visual electronic displays for some individuals, with oral communication only for other individuals, with manual sign-language interpreters for others, and with oral-manual communications simultaneous for even others.

That is the philosophical statement that people talk about when they refer to a total communication system which would incorporate different approaches to different children or different individuals at different times.

Now, I believe the Alexander Graham Bell Association has a definition that would equate the

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simultaneous use of oral and manual communication with the simultaneous method. Some people talk about that as total communication. Some people refer to it as the simultaneous method.

If you consider total communication to incorporate the use of all methods at different times when appropriate, this is, of course, by definition is the most

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appropriate and most flexible way of dealing with deaf individuals.

* * *

With younger children, I worked with the District 287, which is an intermediate unit, a large unit in the Minneapolis, Minnesota area, to develop programs for what I will call

hearing-impaired students, which would include those who would traditionally be considered deaf

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and those considered hard of hearing, those with moderate hearing losses. The program was set up in such a way that we could provide services or they could provide services to children with a range of options from self-contained classrooms to resource rooms where the child might spend a half a day in a regular classroom, half a day with the teacher for the deaf, to the services for children on an itinerant basis, something like what Amy Rowley is receiving now.

We found with the provision of interpreters, that many children who would be considered deaf and who, by themselves, were not able to profit

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from the regular classroom, could spend large amounts of time in a regular classroom to good benefit, but that these children without provision of interpreter services, regardless of their intellectual ability, many of them were not able to function effectively.

Some of the other things that we did with another program which was a St. Paul, Minnesota program, was the integration of deaf and hearing children with a teacher of the deaf and a teacher of the hearing in the same classroom. In other words, the integration of two classes, in which all of the children were taught to use manual communication as well as oral communication. That

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program seemed to work quite

effectively, until the final crunch increased the numbers of deaf children and hearing children in a classroom, and then it became unmanageable.

We have conducted some research on children who have been "mainstreamed" before the age of eight, without the provision of services. We have found that those children who have been effectively put into integrated settings have been those, who by age two, were those who were identified as having better hearing and better speech.

From my experience what you find is that without some intensive support services, the children, with very few exceptions, the children who succeed are those who have large amounts of residual hearing. With the addition of some moderate support

services, for example, interpreters, you increase the numbers of children who can succeed and you also increase the variety of children or the types of hearing losses that can be accommodated in the regular classroom.

* * * [426]

THE COURT: I have one further question.

You were here when Dr. Mulholland testified, and while she may not have said it directly, certainly inferentially she suggested that Amy is an unusually well-adjusted child. And I gathered that the impression that was made on her by actually observing Amy in this setting of the class at the Furnace Woods School, was that the social adjustment that she has been able to make to live

in a society of hearing children with a fairly free -- perhaps the "fairly" shouldn't be there -- with a free communication with those children is a value which has to be weighed against perhaps the other value of a more complete communication.

Do you have any opinion on that?

THE WITNESS: I don't have any evidence to suggest that the provision of interpreter services would detract from her communication skills or her socialization skills. When I say "her," I should put this in a more general way, from a deaf child's socialization skills.

I think most deaf people as they grow, far

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better than hearing people, understand

that they live and deal with hearing people and deaf people in a variety of settings, and most develop effective ways of doing so.

THE COURT: But for a child of six or seven or eight, isn't it very important that if it can be achieved, that she function in an atmosphere which, so far as the children she is functioning with, is as normal as possible?

THE WITNESS: Certainly.

THE COURT: And doesn't the introduction of a sign interpreter make that more difficult?

THE WITNESS: I don't think it would be any more difficult than the introduction of the auditory training units which the children pass around. The question is what is needed to make it effective. Each

time you introduce something there is an element of danger, whether it be an auditory training unit, or whatever, or an instrument such as that.

The question is can it be done without disrupting the give and flow, the give and take, the everyday flow of communication. I think a sensitive interpreter can do so.

PLAINTIFFS' EXHIBIT 2
SUMMARY OF COH MEETING
12/13/78

Case #13 (78/79)

A girl in the first grade at Furnace Woods School who is handicapped due to deafness.

This case was originally brought to the Board on October 13, 1978. The recommendation at that time was for student to remain at Furnace Woods in grade 1 and be provided with the services of a certified teacher of the deaf one hour a day, five days a week and also receive the services of a speech therapist three sessions weekly.

We met again on this case on Monday, December 11th, to consider additional information provided by the parents. The additional information was an affidavit from Dr. Robert Davila, President of the Council on the Education of the Deaf, relating to the question of the use of

interpreters in the school for deaf students.

The DCOH felt that this additional information was again just a one-sided opinion for an interpreter in the classroom for this child and in no way did it change the opinion of this Committee at this time. Therefore, the recommendation for the education of this child at this time is that the student remain in grade 1 at Furnace Woods School and be provided with the services of a certified teacher of the deaf one hour a day, five days a week and also receive the services of a speech therapist three sessions weekly.

In addition, child should receive a formal yearly written evaluation to determine

1. child's progress
2. appropriateness of services.

Plaintiff 9

RESUME

PREPARATION AREA: Deaf

NAME AND ADDRESS: Rowley, Nancy C.
1496 Washington St.
Peekskill, New York 10566

DEGREE STATUS:

Level	Institution	Year Degree Granted	Major Area of Study
B.A.	Gallaudet College	1962	Economics
M.S.Ed.	Gallaudet College	1963	Spec. Educ.
Post-Grad.	Hunter College		Social Stud.
	New York University		Spec. Educ.

PROFESSIONAL EXPERIENCES:

Type of Position	Agency	Date
Teacher: High School Dept. English, Social Studies and Math., Guidance and Health. Faculty advisor for student governing council	Pennsylvania School for the Deaf Scranton, Pennsylvania	Sept. 1963-June 1965
Teacher: Physical Education Dept. and coaching for girls' sports	New York School for the Deaf White Plains, New York	Sept. 1965-June 1966
Teacher: Elementary Dept. English, Social Studies, Math, Reading, and Health	New York School for the Deaf White Plains, New York	Sept. 1966-June 1969

CERTIFICATION

Council on Education of the Deaf
Class A. Permanent

New York State Education Department
Social Studies, Permanent

Commonwealth of Pennsylvania, Depart-
of Public Instruction
Social Studies, Provisional
Teacher of the Deaf, Provisional

CM-521

MEMBERSHIP AND AFFILIATIONS

Professional:

Conference of Executives of American Schools for the Deaf
Convention of American Instructors of the Deaf
New York State Association of Educators of the Deaf
Gallaudet College Center for Continuing Education and Community Education

Social and Civic

National Association of the Deaf
Empire State Association of the Deaf
New York City Civic Association of the Deaf
Teletypewriters for the Deaf, Inc.
Delta Epsilon Sorority
American Athletic Association of the Deaf
Amateur Athletic Union
International Games for the Deaf
National Association of Skindiving Schools
International Association for Parents of the Deaf
World Federation of the Deaf
Gallaudet College Alumni Association
American Red Cross

CURRENT PROFESSIONAL ACTIVITIES

Founder, President of the Board of Directors, Past Chairperson of the Advisory Council, Westchester Community Services for the Hearing Impaired, Inc.
Member, Advisory Board, Westchester County Coordinating Council for the Disabled, Westchester County Government
Member, Task Force on Legislation and past member of Task Force on Architectural/Communication Barriers, Westchester County Government
Consultant, Westchester County Office for Disabled
Member, Advisory Committee, Council for the Arts in Westchester

PAST PROFESSIONAL ACTIVITIES

Participant, 43rd Biennial Convention of American Instructors of the Deaf, West Hartford, Connecticut, June 1967
Vice-President,, President, New York School for the Deaf Teachers Association, 1968-69

Past Professional Activities (Con't.)

Participant, 44th Biennial Convention of American Instructors of the Deaf, Berkeley, California, June, 1969
Vice-President, Metropolitan Chapter, Gallaudet College Alumni Association, 1974-75
President, Metropolitan Chapter, Gallaudet College Alumni Association, 1975-76
Participant, VII th World Congress of the World Federation of the Deaf, 1975
Representative, The Northeast States Community Education Conference, New York City, February, 1975
Participant, IAPD Conference, Washington, D.C. 1975
Chairperson, Westchester Action Conference, White Plains, N.Y., November, 1976
Member, Board of Directors and Chairperson of Funds and Foundation Committee, New York Center for Law and the Deaf, 1977-78
Organize Committee, American Professional Society of the Deaf Conference on Law and the Deaf, New York City, April, 1977
Representative, New York State Alliance for Action Conference in the Field of Education of Children with Handicapping Conditions, 1977
Representative, P.L. 94-142 Workshop, Gallaudet College, Washington, D.C., August, 1977
Representative, National Community Education Action Conference, Virginia, 1977
Participant, 2nd TDI Convention, Rye, N.Y., June, 1977
Participant, Biennial Convention of the ESAD, Albany, N.Y., August, 1979

PUBLICATION

Author, "Education Is A Sleeping Giant", The Panwood Journal, Summer, 1975

AWARDS

CYO Athletic of the Year 1961, Rochester, New York
World Olympic Games for the Deaf, Winner of three medals (gold, silver, & bronze) for swimming, Helsinki, Finland, 1961

Nancy C. Rowley
August, 1979

PLAINTIFFS' EXHIBIT 11 -
WESTCHESTER COUNTY MEDICAL CENTER REPORT 6/78

WESTCHESTER COUNTY MEDICAL CENTER
SPEECH AND HEARING CENTER

Edwin T. Cleveland, M.D.
Associate Attending & Chief
Otolaryncology Section
Division of Surgery

Barbara Kligerman
Audiologist

ROWLEY, AMY
Hospital #881038
Parents: Clifford and Nancy Rowley
1496 Washington Street
Peekskill, New York
D.O.B. 1/7/72
Dates of Examination:

5/25/78, 6/1/78, 6/22/78

HEARING AID CONSULTATION

Amy Rowley, age 6 years, was seen at this Center for audiological re-evaluation and hearing aid consultation. Amy is seen at this Center for speech and language therapy on a twice weekly basis. She has been using two ear level instruments, a Norelco 6732 worn on her left ear since October 1974 and a Norelco 8276 worn on her right ear since December 1975.

TEST RESULTS:

Pure tone testing revealed a severe precipitously sloping bilateral hearing loss which agreed with the thresholds obtained previously both at this Center and at Gallaudet College. Speech awareness thresholds were obtained at the level of a mild hearing impairment which reflects the better hearing at the lowest frequencies. Speech thresholds obtained at significantly higher levels, more accurately reflect the severity of the impairment in each ear. Speech discrimination testing by means of picture identification, is very poor; with visual clues Amy's ability to discriminate among a six word closed set improves dramatically.

Hearing aid evaluation consisted of aided responses to warble tones in sound field and speech discrimination as assessed by the Word Intelligibility Picture Identification Test. These measures were obtained using her own Norelco hearing aids, the Siemens 24 PP A and the Unitron 960 P instruments. Although each of these hearing aids resulted in improved response over unaided scores, significantly better responses were obtained with the Unitron 960 P. Particularly encouraging was the improvement in word discrimination, while both the Unitron and Siemens instruments resulted in improved discrimination, warble tone re-testing demonstrated more consistent results when using the Unitron 960 P hearing aid for each ear, and these findings agreed with those obtained recently at Gallaudet College.

IMPRESSIONS AND RECOMMENDATIONS:

On the basis of the test findings, Amy continues to present a severe bilateral hearing loss which necessitates usage of binaural hearing aids and special educational services including intensive speech and language therapy. It is believed that her good communicative skills are due to a combination of favorable factors: the early and continued use of sign language (both parents are deaf and use oral and manual communication), hearing, speech and language therapy from the age of 2 years, excellent speech reading ability, Amy's intelligence, and continued usage of appropriate and adequate amplification.

This evaluation demonstrated that Amy's hearing aids, one of which is over four years and the other over two years of age, are no longer providing her with with most appropriate nor adequate amplification. In addition, the electro-acoustic analysis of these instruments, conducted at Gallaudet College, raised serious questions regarding their functioning.

Therefore, it is recommended that Amy receive two new Unitron 960b ear level instruments (State price $235 each) to be worn binaurally. New earmolds have recently been made, one of which requires either adjustment or re-making for a better fit and these should be supplied in a soft material (State price $16 each of $32).

Amy should return to this Center for a hearing aid check. Electro-acoustic analysis of each aid is requested to be supplied by the dealer, Sylvester Hearing Aids, 241 Main Street, White Plains, New York. Amy should continue to receive intensive individual speech and language therapy twice weekly at this Center an annual audicogical evaluation.

Barbara Kligerman, Ed.D.
Audiologist

BK:mg

cc: Sylvester Hearing Aid Center
241 Main Street
White Plains, New York

PLAINTIFF'S EXHIBIT 23 -
MEMORANDUM TO ADELAIDE WALDRON FROM BARRY BINDER

To: Adelaide Waldron
From: Barry Binder
Date: 9/15/78
Re: State Requirements for children who are deaf.

At a meeting at BOCES I was informed that all the State requires for a deaf child is that we provide one hour a day of individualized instruction from a teacher of te deaf. A Miss Amy Toole (BOCES Supervisor) informed me that she could provide us with a teacher of the deaf for one hour a day, 5 days a week. The teacher of the deaf would teach speech and language development. The acquisition of such a service would put us in total compliance with State regulations. Any service beyond this is not mandatory.

The bill for the teletype machine, ordered by our district for communication with the Rowly, must be submitted to Dr. Don Coe at BOCES before September 30, 1978. As this order was funded through Title VI-B last year, the deadline for reimbursement is this September 30th.

cc: Mr. Eible
Dr. Zavarella

DEFENDANT SCHOOL DISTRICT'S EXHIBIT 2-COH MEETING MINUTES

Furnace Woods Elementary School
Pupil Personnel Services
I.E.P. Conference for Amy Rowley
December 6, 1978 Wednesday
1:30 p.m. Room 11 Furnace Woods

Present: Mr. and Mrs. Rowley with Interpreter Robin Read
Mrs. Globerman - (Amy's Teacher)
Mrs. Garzione - (Speech Therapist)
Mrs. Williams - (BOCES Teacher of the Deaf)
Ms. Klausner - (Psychologist)
Mrs. Roberts - (Nurse/teacher)
J. Zavarella - (Principal)

The meeting began late at 2:50 p.m. - After the initial amenities were exchanged and seating arrangements established for the Rowleys to have best visual access to the interpreter as well as eye contact with all present we discussed the purpose of the meeting.

Purpose - To develop with the parents the Individual Educational Plan for Amy.

Mrs. Rowley asked if everybody knows what an IEP is and it was stated that we all knew.

Then they asked permission to distribute a copy of an affidavit prepared by:

Dr. Robert Davila, V.P. for Model Secondary School
for the Deaf
Kendall Demonstration Elementary School for the Deaf
Gallaudet College
Washington, D.C. 20002

In brief this paper establishes one person's conclusion that an interpreter is necessary in school.

The point was made that although interesting to us it can have little or no bearing on the development of an IEP.

For details of IEP please refer to the attached.

Mrs. Globerman then went through her prepared notes defining all the parts of the IEP. She also included inputs of specialists in music, art, phys. ed and library.

Mrs. Garzione then described her goals and objectives for Amy. This was quickly followed by Sue Williams' goals and objectives for Amy.

Mrs. Rowley suggested that the IEPs should be copies so that they could be reading it and therefore have better understanding.

After discussion on the data about Amy's progress we cleared the issue of achievement tests and that Amy would take the test in May as part of our annual evaluation.

Ear molds must be replaced for the Earmark aids used in room.

Mr. Rowley asked that we commit ourselves to help Amy if she needs help. We have certainly had Amy's best interest at heart and if she begins to falter at any point we shall make all necessary arrangements to seek a solution to her problem.

The Rowleys did not agree with the IEP on the basis that a recommendation for a sign language interpreter was not included, therefore we must submit the case to the District Committee on the Handicapped for its review.

Please note that Furnace Woods P.P.S. did not agree with the Rowleys that the need for a sign language interpreter has been demonstrated. We continue to observe a well adjusted, bright, and achieving first grader. There is no reason at this time for us to consider the sign language interpreter as a necessity for Amy. However, if and when such a need arises we've assured the Rowleys that this staff would certainly consider recommending the interpreter as an option among many to resolve the problem. The IEP will be re-typed and attached to these minutes with a request to Mrs. Waldron that the D.C.O.H. review the case.

Respectfully submitted,

J. Zavarella, Principal

DEFENDANT SCHOOL DISTRICT'S EXHIBIT 6 - AMY ROWLEY'S SCHOOL RECORDS

Hendrick Hudson School District
Montrose, N. Y.

Elementary Record

F.W.
School

Last Name Rowley First Amy Middle June

Parent or Guardian Clifford - NANCY
Address 1496 Washington St. 737-5117 Peek.
Phone

Occupation Research Chemist
Employer Lonza Inc.
Address 22-10 Route 208 Fairlawn N.J.

Dates
Birth: 1/7/72
Mo. Da. Yr.
Certificate: X List other
Entrance: 9/77
Left:

Year	K		1		2		3		4		5		6		Repeat		Repeat	
Terms	1	2	1	2	1	2	1	2	1	2	1	2	1	2	1	2	1	2
Teacher	Tower		Globerman															
Grade	K	K	1	1														
Date	77	78	78	79														
Days Absent	2	2	12	2														
Reading			E	E														
Writing			G	G														
Spelling																		
English			E	E														
Arithmetic			E	E														
Soc. Studies																		
Science																		
Art			E	E														
Music			S	G														
P. E.			G	G														

OAG-529

Standardized Tests

Name of Test	Form	Date	Gr.	Sub.	Gr. Ach.
Brebin Inventt.	B	2/28	K		.21
Met. Ach. Test	G	5/79	1	Read	2.2
				Math	2.1

Mental Tests

Name of Test	Form	Date	Gr.	C.A.	M.A.	I.Q.

Remarks

1st. Speech, Teacher for the Deaf.

TRANSCRIPT OF ORAL ARGUMENT BEFORE THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
- - - - - - - - - - - - - - - - - -x

AMY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY in their own right,

Plaintiffs-Appellees,

-against-

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT OF WESTCHESTER COUNTY and the COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants-Appellants.

- - - - - - - - - - - - - - - - - -x

U.S. Customs Courthouse
New York, New York

May 1, 1980
11:20 o'clock A.M.

B E F O R E:

WALTER R. MANSFIELD, Justice, C.J.J.

WILLIAM H. TIMBERS, Justice

DUDLEY B. BONSAL, Justice, D.J.

* * *

MR. SHERMAN: [5]

Your Honors, New York, as well as all the other states, with the exception of New Mexico, received federal monies under Title 20, U.S. Code, Section 1401 et seq. and I also understand that New Mexico may be coming in the fall soon.

In order to receive these monies, New York must provide all handicapped children within its borders, a free appropriate education.

What does this mean? It means, as the statute indicates, that the children will be provided with a special education and related

[6]

services at no charge.

Special education is a kin to curricular or the type of instructon that

will be offered to the children.

These must be adapted to meet the unique needs of the children.

Now, related services are those services which assist the child in benefiting from this special instruction, or special program. It wouldn't make any sense to have a special instruction in place and then not provide any services to the child so the child cannot benefit from that program.

Each year, the states must demonstrate their compliance with the statute by submitting a plan to the United States Commissioner of Education indicating exactly how they will provide a free appropriate public education to its children.

Now, for the two years in question in this case, that is the school year

[6]

1978-79, and the current school year, 1979-80, Commissioner Ambach and his staff have prepared or prepared and submitted to the United States Commissioner of

[7]

Education, a state plan which indicates how the handicapped children of New York will receive a free appropriate public education. That is, what type of instruction will be applied and what type of related services are mandated.

JUDGE BONSAL: This is across the boards?

MR. SHERMAN: This is across the boards, sir.

JUDGE BONSAL: Yes.

MR. SHERMAN: Again, both years the U.S. Commissioner has approved New York State plans, notwithstanding the

[7]

fact that these plans do not require the local educational agencies or the local boards of education -- it does not require them to provide each deaf child the services of a certified sign language interpreter when academic subjects are being taught.

JUDGE MANSFIELD: Does the plan preclude the use of such an interpreter?

MR. SHERMAN: The local educational agencies could provide these services.

JUDGE MANSFIELD: What?

MR. SHERMAN: The local educational agencies or boards of education -- it is

[8]

the Commissioner's positions that the local boards could provide these services and, in fact, the educational department would reimburse the dis-

trict for providing it, however --

JUDGE MANSFIELD: What significance is there to the fact that the federal Commissioner approved the state's standards?

MR. SHERMAN: When I say "they could," your Honor, I understand these are not mandated.

JUDGE MANSFIELD: That may be. All I want to point out -- I thought your argument was that since the state plan was approved, it contained nothing in it with respect to sign language interpreters; therefore, there was no obligation to provide them.

MR. SHERMAN: There is no obligation under the statutes or under the state plan; however, the local educational agencies or boards of education

[8]

certainly could provide more services then are mandated by law.

I think that is the whole point here. In fact, if they did provide such services and in the case of Amy Rowley, or any child, we certainly would reimburse them for providing it.

[9]

JUDGE MANSFIELD: The federal statute does provide in addition to, in defining free appropriate public education, that it must not only meet the standards of the state educational agency, but also include an appropriate pre-school elementary or secondary school education in the state involved.

MR. SHERMAN: That is correct.

JUDGE MANSFIELD: Doesn't that flatly raise the question of what is the meaning of the word "appropriate"?

[9]

MR. SHERMAN: Well, in the case abar, we submit that the performance of the child certainly clearly indicates that she is receiving the instruction without these services that are not mandated by the statute.

Now, the district, I am sure, will take the position that they could provide the particular service here, but are they required to?

I think that is the question that has to be answered by this Court.

JUDGE BONSAL: Is it your position that these local boards, in effect, should have the autonomy -- they have the expertise, you think,

[10]

to determine these conditions rather than the Courts? Is that what you are saying?

[10]

MR. SHERMAN: Absolutely.

JUDGE BONSAL: Is that your point?

MR. SHERMAN: That is one of my main points. Under the statute itself, as a matter of fact, it provides for these due processes of reviews and, of course, includes a review by the federal courts.

JUDGE MANSFIELD: Is this a review -- I mean by the District Court -- or is it a new trial?

MR. SHERMAN: Well, the federal statute indicates that the Federal Court shall receive the records or what have you before the local Commissioner of Education -- I mean the State Commissioner of Education -- and then it also provides that additional evidence may be taken.

[10]

Now, that apparently is a -- it is a review and also it is a new hearing. This gives the Commissioner some problem. He doesn't know what his role is in this at this point.

He made a decision based on some evidence on what was before him and now we are in the Federal Court at this point and, as a matter

[11]

of fact, a school year the Commissioner had nothing to do with.

He had no way of reviewing this particular placement and he is really quite concerned as to what his role is here.

If he has got a trial de novo, well, quite frankly, what is he doing here?

JUDGE MANSFIELD: What is your position on the subject?

[11]

MR. SHERMAN: The statute is pretty clear. It does say that additional evidence may be taken.

JUDGE MANSFIELD: But what I am trying to find out is whether that additional evidence is taken as part of a review or to supplement a review, or whether it is a complete new trial.

Normally, where you review the decisions of the administrative bodies, there is a whole body of law applicable under the Administrative Procedure Act and one normally will say that if there was substantial evidence to support findings of the state bodies, or any governmental bodies that are being reviewed, that they will be upheld

[12]

absent some basic legal error.

[12]

Here you have a statute which does provide for steps in administrative review, but that apparently provides that any party agreed by the findings made pursuant to that administrative review can bring a suit in the Federal Court and the Court then has to hear additional evidence and base its decision on the preponderance of the evidence.

Now, does that mean that this court starts from scratch and you get, in effect, two bites of the cherry?

MR. SHERMAN: I don't believe it should work that way.

JUDGE MANSFIELD: No, but the question is what was intended?

Did you ever look at the legislative history to find out?

MR. SHERMAN: Yes, I did. There was some talk at the time of an enact-

[12]

ment whether the review by the Court would be the same as -- well, for example in New York State, like an Article 78.

One of the actions is the officials

[13]

arbitrate capriciously and not based upon substantial evidence.

This apparently -- the present language is apparently a compromise between the forces that profess the Article 78 type review versus a federal cause of action which would provide for complete trial de novo.

I don't know why the compromise.

JUDGE MANSFIELD: What you are saying is we are dealing with a new animal here.

MR. SHERMAN: Absolutely.

JUDGE MANSFIELD: All right.

[13]

MR. SHERMAN: In this particular case, Commissioner Ambach was reviewing a -- well, let me just go back. As far as the U.S. Commissioner is concerned, he has taken a look at the statute and has found that it does not require the services of a sign language interpreter.

In other words, New York is not required to mandate these particular services to satisfy his obligations under the statute.

Of course, we are submitting that the U.S. Commissioner's construction of this statute

[14]

should be given great weight. It should not be disturbed unless it is known to be patently wrong.

* * * [26]

JUDGE MANSFIELD: Did the Commissioner of Education, or the district state what standard there should be for determining the unique needs of handicapped children who were deaf in relation to the state's educational process?

MR. SHERMAN: Well, we certainly demonstrated what the district was providing in the case of Amy Rowley.

JUDGE MANSFIELD: Yes, but the question is what program -- what is meant by "Appropriate" and does that mean a program that will allow a child to become self-sufficient?

Does it mean a program that will allow a child to reach his or her maximum potential,

[27]

or does it mean a program that will

[27]

enable a child to become as independent as possible from dependency of others, or does it mean, as the District Judge thought, that the child must be given an education that will develop the child's potential to an extent comparable to the development of the potential of other children in the district?

MR. SHERMAN: Well --

JUDGE BONSAL: If I understand, an equal opportunity to obtain this education. Is that the standard?

MR. SHERMAN: We certainly feel that handicapped children should be given an equal opportunity to attain an education.

We have a lot of trouble with the lower court standard. He said how you apply this standard and to determine whether the child is getting an equal

[27]

opportunity is: You compare the child's -- this is the handicapped child's -- potential with that child's actual performance.

Now, obviously every -- and that is considered to be a short form.

JUDGE MANSFIELD: I am unclear from that

[28]

whether you agree that the standard was a correct one.

I got the impression from --

MR. SHERMAN: It is totally incorrect.

JUDGE MANSFIELD: I got the impression you did not agree with that.

MR. SHERMAN: It is not only incorrect, it is unworkable.

JUDGE MANSFIELD: What do you say the standard was and what standard was applied by the state bodies that

[28]

reviewed this case?

MR. SHERMAN: This shall be done on an individual basis. That is the whole point here.

JUDGE MANSFIELD: What?

MR. SHERMAN: To determine whether a child is receiving an appropriate education you have got to look to that child's performance in the classroom.

You cannot come out and say --

JUDGE MANSFIELD: I understand, but even if you determine every case is determined on an individual basis -- I hope -- the question is what standard do you apply in making that determination in each individual case?

[29]

MR. SHERMAN: Whether the child is receiving an education. Whether the child is receiving the skills to enable that child to function in his

[29]

world. Whether the child can learn to read, can learn to do mathematics, can learn to -- the goal of education is to educate the children.

Now, you certainly look to see if that particular child is receiving an education.

In the case of Amy Rowley, it is clear.

JUDGE MANSFIELD: Aren't you of necessity required to compare with others in making that determination?

MR. SHERMAN: Well, I don't believe we are. I don't believe so, your Honor. I don't believe that is the standard at all.

I think there have been numerous court cases that said that school districts or state education agencies, or what have you, don't have to maximize the potential of children.

[29]

Certainly we want to do that and we are attempting to do that, but we recognize there are so many factors involved that it cannot be

[30]

done unless you have unlimited resources.

JUDGE BONSAL: The potential of unhandicapped children is competely different, too; isn't it? I mean it seems to me what you are talking about here is giving the handicapped child no further -- I don't know whether potential comes into it -- but the handicapped child should have an equal opportunity with unhandicapped children to receive whatever it is the school can offer.

MR. SHERMAN: I think that is true. There is no requirement that nonhandicapped children be provided an

[30]

education that will maximize their potential.

JUDGE BONSAL: No. I think that is it. If they got the equal opportunity, then from there on, it is up to them.

MR. SHERMAN: Well, I think that if you take a look at this child's performances --

JUDGE BONSAL: I say I don't know why that matters. Suppose the child's performance is very good? Isn't the test really whether this child had an equal opportunity with the others to learn the things that were taught in the

[31]

classroom? If the question is this child didn't because there was no sign language interpreter -- isn't that really the question?

[31]

MR. SHERMAN: Your Honor, there was absolutely -- the record is devoid of any evidence indicating what opportunity has been given to the nonhandicapped children in this district.

It would seem that the burden would rest with the plaintiff to demonstrate that she, in fact, was being denied this opportunity.

If there is nothing in the record to make this comparison --

JUDGE BONSAL: The record indicates she's a handicapped child. All right.

MR. SHERMAN: Yes, it does.

JUDGE BONSAL: Sure.

* * * [32]

JUDGE TIMBERS: Maybe Mr. Sherman would yield some of his time to you.

MR. SHERMAN: I am Mr. Sherman.

JUDGE MANSFIELD: Oh, you are Mr. Sherman.

[32]

MR. SHERMAN: I am Mr. Sherman, representing Mr. Ambach.

I guess I don't have too much time to give him.

Thank you.

MR. KUNTZ: May it please the Court, I am the real Raymond Kuntz, the attorney for the Hendrick Hudson School District.

The issue before this Court is whether the school district can be compelled under the provisions of the Education of Handicapped Children Act of 1975 to provide a supplementary service to a handicapped child in the face of irrefutable evidence that this child is performing extraordinarily well under the current supplemental services of and special education provided to that child in the hope that the additional service might -- and I

[32]

stress that -- might in some fashion help that child to do better than the child is already doing.

[33]

The District Court below answered that question in the affirmative by applying, in our opinion, a standard not sustained by the lanugage or the intent of the applicant.

The District Court's standard was that each handicapped child be given an opportunity to achieve full potential commensurate with the opportunity given to other children. The District Court went on -- because I frankyl think that we have no great disagreement with that standard as a standard per se, but it is inevitably coupled with the discovery process of how the local school disctrict may determine that it is meeting that standard --

[33]

and the District Court went on to say and requires that the potential of the handicapped child be measured and compared to his or her performance and the resulting differential, or short fall between the actual performance and the purported potential compared to the short fall experienced by non-handicapped children.

The District Court reached its definition on the theory that the Act did not contain a definition of a free appropriate public

[34]

education.

But the Act does, and I think Judge Mansfield, you focused in before on that Subdivision of 20 U.S.C. 1401, Subdivision 18, which defines a free appropriate public education and essentially consists of four elements.

[34]

It says that free appropriate public education is special education and related services which, one, are provided at public expense, supervised publicly and without charge, meet the standards of the state educational agency -- here's your point -- includes an appropriate education in the elementary, secondary school program in the state and is in conformity with the individualized educational program.

Now, I don't believe that the language of the Act is a redundant tortology, so-to-speak, that in a free appropriate public education, there is, among other things, an appropriate public education.

I think the framers of the Act meant the local school district and

[34]

the state to look at all of the elements.

Special education is defined as specially

[35]

designed instruction at no cost of the parents to meet the unique needs of the handicapped child.

And related services are those which assist the handicapped child to benefit from the special education.

So we have a clear plan set out in the federal Act as to what is expected of the state when the state submits its plans to the Federal Commissioner and what is expected of the local school district when it submits its plans and its judgments to the state authorities for review.

It is interesting in this regard to look at the definition of audiology in

[35]

the regulations.

Audiology is there defined in some six or seven paragraphs in terms of related services and in none of those paragraphs, which are quite extensive, is the service of a sign language interpreter mandated as a related service under the Act.

JUDGE MANSFIELD: I ask you the same question I asked Mr. Sherman. Do you say that

[36]

precludes the --

MR. KUNTZ: No.

JUDGE MANSFIELD: (Continuing) -- the use of a sign language interpreter in the appropriate case?

MR. KUNTZ: I say it does not mandate it. I say it is very clearly the Act's intent that certain remedical services be provided to handicapped

[36]

children who are deaf.

JUDGE MANSFIELD: Doesn't the question of whether it is mandated depend upon how you define "appropriate," to some extent?

MR. KUNTZ: To some extent.

JUDGE MANSFIELD: And who makes that determination of what the standard is? The school district, the Commissioner of Education of the State or the District Court of the United States?

MR. KUNTZ: I think appropriately -- and this goes to your question on the standards of review -- I think that it has to be the local educational authority.

* * * [41]

JUDGE TIMBERS: What was the objective of the injunction sought? You mentioned irreversible error.

[41]

MR. KUNTZ: Irreversible harm. The purpose of the injunction was to order a sign language interpreter into the class precisely at that moment.

JUDGE TIMBERS: That is not to enjoin in a conventional sense we use it? If that was a mandatory injunction --

MR. KUNTZ: Yes, it was.

JUDGE TIMBERS: There is no question about that.

MR. KUNTZ: No, there was no question with that.

I think that when the --

JUDGE TIMBERS: Do I understand that you do not dispute the right of the plaintiffs here to seek a mandatory injunction, or the power of the Court to grant it?

You say it should not have been granted.

[42]

MR. KUNTZ: I don't think that we have --

JUDGE TIMBERS: What I am getting at is there is no quarrel about the propriety of the procedure involved.

MR. KUNTZ: It is very clear under the Act. It seems to me they have the right to go to the Federal Court and I think that under the Act they have the right to ask for a mandatory injunction.

JUDGE MANSFIELD: You are using very general language. It says the Judge can grant whatever --

MR. KUNTZ: Yes, he does, and I can't say that the appropriate act --

JUDGE MANSFIELD: Whatever is --

MR. KUNTZ: The Act is a constraint in that regard. I certainly --

[42]

JUDGE MANSFIELD: Yes. That does use "appropriate."

MR. KUNTZ: I wouldn't want to argue the case on that basis. I think that the school district's arguments are better based on the arguments made in the brief that it made here, that the power was exercised improperly and inappropriately in view of the evidence.

[43]

Let me come back to the evidence because I think that is critical to the school district's determination here.

In utilizing the Judge's standards, we come up against an impossible task.

There are no present tests that I know of that would measure the short fall of a handicapped child. In fact, no test that I know of that measured

the short fall of nonhandicapped children.

Were such tests to be developed, I am not sure that we wouldn't be met by outright and rebellion on the part of the local parents to the administration of those tests on a universal basis to the children to make the kinds of determinations suggested by the Judge.

The only evidence that was available to the District Court was how Amy is performing and the intelligent quotion test that she took earlier on in her career. That test identifies Amy as in the upper range of the average bright, normal child. She's not a genius, she's not a spectacular person of spectacular intelligence. She's in the high normal range and her perform-

[43]

ance in the classroom is exactly as you would expect somebody of that

[44]

intelligence, given the composition of her class, to achieve. She achieves in the upper middle range of the class, which is precisely where she's in terms of her I.Q. as compared to the other I.Q.s of the other 18 children.

JUDGE MANSFIELD: What is your answer to the argument which I understand the other side to make that represents, in effect, an overachievement as attributable to an awful lot of hard work, a lot of hours, a lot of school and that you are still faced with the fact that she has a major deficiency in hearing and therefore is far below the other students in the ability to hear and

[44]

understand what is going on in the courtroom -- classroom. That was a Freudian slip.

In the school room.

MR. KUNTZ: Two answers.

One, the testimony at District Court was that Mrs. Rowley spends an hour a day with Amy. I respectfully suggest that there is no more than the average parent, maybe a little bit less than the average parent spends with a normal child in that classroom.

Secondly, that classroom is designed right

[45]

from the beginning to assist Amy's understanding, and it's been the testimony of everybody who went into that classroom and who was subject to cross examination on what they saw

there that she does understand what goes on in that classroom.

She understands so well that she can respond to questions perfectly adequately, she can help other students.

She's in full participation in that class and there wasn't any evidence to the contrary at either the hearing before the independent Hearing Officer, or the hearing before the District Court.

In fact, the district's history here is remarkable history. Before Amy came to this school, the teachers there looked upon her entry to that school not as a burden, but as a challenge and a unique opportunity to give this one child everything they could in terms of what they were able to deliver.

[45]

So they organized themselves around a program designed to make Amy succeed in her classroom, and they succeeded in doing that. Their efforts were so coordinated that they had eight teachers, or I think it's maybe even more, who

[46]

went to a special sign language class in the event that they might run into Amy in the art class, in the physical ed class, in the library, so that even on the peripheral classes and instructions, they would be able to focus in on Amy. They instructed the teacher in a special way, the principal visited there daily. He testified at the hearing before the independent Hearing Officer. The teach spent -- her first grade teacher spent the entire summer before first

[46]

grade reviewing tapes on how to sign and how to communicate with a deaf child.

The school district did not adopt any philosophical approach to Amy. They said whatever works for her. And I think that is an important part of this case. They weren't opposed to a sign language interpreter. They never were. They still aren't. What they said was, "Look, let's see if a sign language interpreter works."

So in the spring of 1978, they put a sign language interpreter in her class for a two-week period as a test to see whether that would be something that would benefit Amy. At the end of that test, everybody who observed it, everybody

[47]

who had anything to do with it said

she doesn't need this service.

As a matter of fact, the service may be a distraction to her and may be a hindrance to her proper learning.

Now, the Judge in the District Court said, well, the difficulty with accepting that evidence is that Amy probably was not trained to look at the sign language interpreter. But that is a conclusion, I think, that can be readily looked at from another prospective.

If Amy, in fact, as is claimed, spent her life with the sign language as one of the services that she had as part of her upbringing, she was already attuned into sign language. The fact is that the reason she didn't look at the sign language interpreter was that she was getting everything that she needed to get and all her

[47]

understanding from looking at her classroom teacher. She also has a discreet F.M. wireless hearing aid which is very appropriate under the circumstances because what it does is it screens out sounds and allows her to hear only those sounds which the speaker is speaking into the

[48]

transmittal end of the F.M. receiver. But I think when you look at this case, what you see is that this school district did everything that was possible to do to function and to have Amy function in the classroom which forced her understanding, and they were successful.

Now, the plaintiffs come before you and say, "Let's wipe out all of that, let's try a new approach on the ground that that approach may be more suc-

[48]

cessful than the already result that you have achieved."

* * * [48]

MR. CHATOFF: May it please the Court, my name is Michael Chatoff. I am the attorney for the plaintiffs Clifford and Nancy Rowley and their infant daughter, Amy, who is deaf.

The suit was initiated under the Education For All Handicapped Children Act of 1975 and Section 504 of the Rehabilitation Act of 1973, in order to determine the question of what services Amy must receive in order to provide her an appropriate education to serve her unique needs.

[49]

Amy cannot process communicatons of hearing alone. She cannot learn to hear; no one can teach her to hear. Her parents want her to have a sign

language interpreter so that she can understand the same material that other children understand.

It is their position that if she's going to have an equal change to succeed as a student and to succeed in life, that she has to receive the same information as everyone else.

Basically, their position is that she's entitled to an even chance. Judge Broderick considered this matter and determined, by the preponderance of the evidence, that the plaintiffs had proved their relief requested. Amy is a good lip-reader, but lip-reading is a very imprecise science. Only 26% of spoken words are visible on the lips. Normal lip-reading is no more reliable than reading tea leaves.

I am considered a good lip-reader. I can't understand anything that is

[49]

going on in these proceedings using the lip-reading alone. That is why I have a note-taker and an interpreter with me. It is written all over the record that Amy

[50]

is severely deaf. In ideal situations, she misses at least 41% of what is said. This Court could not properly consider any matter before it if it missed 41% of the material presented. The appellants argued that they have complied with the state plan.

First, they think they have complied with the wrong section of the rules. They haven't even properly complied with that section, but the section that they think they must comply with is the wrong section entirely.

* * * [51]

JUDGE MANSFIELD: Why, under this statute, should the Federal Court be getting into the question of what is an appropriate education for a handicapped child when normally that is an administrative determination made by experts in education?

I think that states my question.

JUDGE BONSAL: I think I would like to add one thing to that question. Perhaps, as Mr. Chatoff stated, Amy's parents are very anxious to have this sign language interpreter in the classroom, but is that the controlling factor before the Federal Court?

MR. CHATOFF: To answer the first question, Section 1415(e) of Title 20 specifically grants Federal Court jurisdiction in questions

[52]

involving the appropriate education of handicapped children in states that receive funds under the Education For All Handicapped Children Act of 1975, and New York receives funds under that Act.

Second question:

The statute provides that services for a child must be based upon an individualized education plan and the individualized education plan is to be according to a joint effort between the school and the parents.

These statutes specifically grant the parents of the handicapped child an opportunity to try to determine how their child's handicap will be compensated for.

JUDGE MANSFIELD: I understand what you say but what is the purpose in

[52]

having an administrative review by the state if you are going to have a brand new determination of the whole question by the Federal Court?

MR. CHATOFF: That is, I think, very similar to the question of appellate review in every instance.

The statute establishes a rather detailed

[53]

administrative procedure under which perhaps 95% of all matters relating to the implementation of the 1975 Act will be resolved.

Only in the case of the remaining 5% will the matter proceed on to either State or Federal Court determining the decision of the party bringing the case to court.

JUDGE MANSFIELD: What standard did the Commissioner of Education for the

[53]

State apply in determining whether the education and the unique needs of the handicapped child here were satisfied under the Act?

THE INTERPRETER: I am sorry; I missed part of that question, your Honor.

JUDGE MANSFIELD: What standard did the Commissioner apply in determining whether the unique needs of the handicapped child here were met within the meaning of the Act?

THE INTERPRETER: Thank you.

MR. CHATOFF: I believe, although it is not clearly set out, the Commissioner determined that an appropriate education is an adequate education, an education that will enable a child to progress from one grade to the next until the child graduates

[54]

from high school. That, I believe, is the determination of the Commissioner of Education.

JUDGE MANSFIELD: Having in mind that Federal Judges are not experts in the field of education, what is your answer to the argument that a provision of a sign language interpreter might adversely affect the education of a child by diverting it from the other methods of understanding what is said, such as lip-reading and this discreet F.M. apparatus and make the child more dependent upon the interpreter than upon the type of situation that the child will be confronted with throughout his or her life?

MR. SHATOFF: I think it was made very clear in the record that the use of total communication by a deaf child

[54]

improves all communication skills.

Amy speaks more clearly than 99% of deaf children her age because of the use of total communication. Total communication provides a child with an opportunity to receive information, places information in the child's brain and stimulates a desire to learn.

I don't believe it has any detrimental effect whatsoever on interaction with hearing

[55]

people in school or later in life.

I think deaf people, better than hearing people, understand that they live in a hearing world. Deaf people will make considerable effort to make themselves understood than a hearing person. They will go well over halfway, but they cannot go all the way.

[55]

They cannot teach themselves; they cannot learn to hear.

It is important that the other person makes some adjustments for deafness as well.

* * * [56]

JUDGE MANSFIELD: Are you saying in substance that every deaf child must have a sign language interpreter in the class in order to have total communication which is part of the educational process?

MR. CHATOFF: Definitely not. Definitely not. It is my position and the position of the plaintiffs that the parents of a deaf child have the right and duty to determine how to raise their child and if the parents determine that their child shall be raised strictly by oral methods, shunning total communication entirely, then that is their right.

[56]

Parents have a very definite responsibility to determine how to raise and educate their child. I think that is clearly written into the Department of Education Organization Act.

However, on the other hand, if the parents of a deaf child think it more important that

that child understand what is [57] transpiring -- what is going on around them -- it is the parents' place.

In this case, Mr. and Mrs. Rowley determined for themselves that they would rely on total communication because they wanted to understand what was going on around them.

They made that same decision for Amy based on their own experience and based upon Mrs. Rowley's experience. She's a certified teacher of the deaf.

[57]

JUDGE TIMBERS: Can that fact alone distinguish this case or make it something other than a typical case under the statute?

Here you have a mother who is a certified teacher of the deaf. I don't know whether that means she teaches other persons than Amy, but here we have spent close to an hour or the better part of an hour here today reviewing this and I just wonder how feasible it is that this is not a test case or a class action, how feasible it is for the Federal Courts, even under this rather broad and ambiguous statute, to dissect with a minuscule comb proceedings before the state bodies. You have got proceedings before the

[58]

Hearing Examiner, the Commissioner of

Education reviewed it, now the District Court has reviewed it and I suppose after we get through you are going to go to the U.S. Supreme Court, all for the sake of Amy.

Now I am sure Amy is a very delightful person, but how many times is this Court or the Courts of the United States going to have to go through this procedure and particularly, Mr. Chatoff, in view of what you hve said repeatedly that each parent or set of parents should be permitted to make the determination as to what is the total educational program of the child, including whether or not an interpreter is needed.

I am going to withdraw the question.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
79 Civ. 2139 (VLB)

ORDER

----------x

AMY ROWLEY, by her parents and natural guardians, Clifford and Nancy Rowley, and Clifford and Nancy Rowley, in their own right,

Plaintiffs,

-against-

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, Westchester County, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants.

----------x

VINCENT L. BRODERICK, U.S.D.J.

Plaintiffs have moved by order to show cause for the appointment of Robert Manley to retain, at the expense of defendants, a certified interpreter for the deaf to interpret for Amy Rowley during any school period in which academic subjects are taught.

A conference was held with respect to this application. The defendant Hendrick Hudson Central School District represented, through its attorneys, that it was making, and would continue to make, every effort to identify and retain a qualified sign language interpreter for Amy Rowley, and that it had enlisted the good offices of Robert Manley to assist it in this endeavor. Both defendants represented that there is no provision in New York State for certifying "interpreters for the deaf."

It has further been represented that although the responsibili8ty for selection and appointment is that of the school district, Amy's parents will be consulted. The defendant Commissioner of Education has

independently represented that it will render to the school district every possible assistance.

In my judgment the defendant school district can be relied upon to discharge in good faith its responsibilites. I have had occasion before, in a different context, to note this (483 F.Supp. 528, 530, 531 (1980)).

In light of the representations made, I deny without prejudice plaintiff's motion to appoint Mr. Manley to retain an interpreter for the deaf. I also deny plaintiff's application, brought on by the same order to show cause, to find defendants in contempt.

SO ORDERED.

Vincent L. Broderick, U.S.D.J.

Date: New York, New York
September 23, 1980

No. 80-1002

Supreme Court, U.S.
FILED
JAN 19 1981
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Petitioners,

-against-

AMY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY in their own right,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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STATUTES INVOLVED

In addition to section 615(e)(2) of the Education of the Handicapped Act, as amended by the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1415(e)(2), this case was initiated under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the pertinent regulations promulgated thereunder, 45 CFR Part 84, Subparts A and D; and 42 U.S.C. § 1983.

STATEMENT OF THE CASE

The facts of this case, as set forth in the petition for certiorari, are so inaccurate and set forth so selectively that they bear no relation to reality.[1] The facts are adequately

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[1] To cite just one example, there is no such thing as "a discrete sound amplification device." (Petition, page 4).

set forth in the opinion of the district court, 483 F. Supp. 528.[2]

The statements made in the petition for certiorari concerning the contents and substance of the circuit court and district court decisions are replete with distortions, inaccuracies, and untruths.[3] It is respectfully suggested that this Court refer to the decisions themselves.

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[2] It is respectfully suggested that this Court refer to the reported opinion of the district court, inasmuch as Appendix C of the petition for certiorari omits part of that opinion and contains typographical errors.

[3] To cite just one example, Judge Broderick did not find that local school districts must provide "an education which enables the handicapped child to achieve his full potential." (Petition, pages 12-13).

REASONS FOR REFUSING TO REVIEW THIS CASE

1. THERE IS NO CONFLICT AMONG THE CIRCUITS.

2. THE COURT OF APPEALS HAS NOT DECIDED A FEDERAL QUESTION IN CONFLICT WITH A STATE COURT OF LAST RESORT.

Section 4402(2)(a) of the Education Law of the State of New York provides that services shall be made available to a handicapped child in accordance with the child's individual needs.

The New York Court of Appeals has held that Article 11, Section 1 of the New York State Constitution assures that each handicapped child will be provided with a free public education, including the services necessary for that educa-

tion to be meaningful to the child. Matter of Levy, 38 N.Y.2d 653, 382 N.Y.S. 2d 13 (1976).

At the oral argument before the court of appeals, each petitioner conceded that the Regulations of the Commissioner of Education of the State of New York[4] are broad enough to encompass the provisions of an interpreter for a deaf child.[5] In their petition for certiorari, the petitioners concede once again that the regulations are broad enough to encompass the provisions of an interpreter for a deaf child when the child's unique needs so require. (Petition, page 26).[6]

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[4] Section 200.4(c)(1) of the regulations, which the petitioners have omitted from their petition, provides that: "The formation of resource programs as instructional service options shall depend upon the nature of the child's capabilities and individual needs."

[5] Oral Argument before the Court of Appeals

Thus, Judge Broderick was called upon to, and did, apply the State implementing standards, in order to provide services to Amy Rowley because of the unique needs occasioned by her deafness in order to furnish her with a free appropriate public education.[7] This case never has

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("TCCA"), pages 7-8, 35-36. See also, petitioner school board's memorandum of law in response to respondents' memorandum of law in opposition to the petitioner's motion to dismiss under Rule 12(b), page 5; and petitioner school board's trial memorandum of law, page 15.

In the district court, neither petitioner pleaded or argued that the regulations preclude the provision of a sign language interpreter for a deaf child.

[6] Indeed, the plan submitted to the United States Commissioner of Education under 20 U.S.C. § 1413 for school year 1978-79 specifically envisions the use of sign language in the education of deaf children. Helping Children With Handicapping Conditions in New York State, 1978-79, page 34.

[7] If, as petitioners claim (Petition, page 24), they applied only section 200.4(d)(4) of the Regulations of the Commissioner of Education, disregarding section 200.4(c)(1) (note 4, supra) and section 200.4(a)(2) ("Unless

and never will raise anything more than a question of fact, as recognized by the attorney for the petitioner school board (TCCA 43). On the evidence presented, it would have been a virtual impossibility for any reasonable person to find against the respondents.[8]

---

the student's handicapping condition requires special classes, the student shall be educated in regular classes with appropriate supportive supplementary assistance."), then it was the petitioners, not the district court, who based their determination on a category of handicapping condition (deafness), rather than on Amy Rowley's unique needs.

Respondents' (plaintiffs') Exhibit No. 23, introduced at the hearing, shows clearly that the school board furnished Amy with what it deemed to be the minimally acceptable educational program provided for in the regulations for a deaf child. The petitioners failed to present that exhibit to the court of appeals; it was presented separately by the attorney for the respondents. Chernack v. Radlo, 331 F.2d 170, 171 (First Circuit, 1964).

8 "The policy underlying the 'two-court' rule is obvious. This court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues. When, as here, resolution

3. THE PETITIONERS HAVE NOT RAISED ANY ISSUES THAT SHOULD BE SETTLED BY THIS COURT.

The petitioners appear to contest the standard for "free appropriate public education" set forth in the opinion

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of the disputed factual issues turns largely on an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court, the rule has particular force . . . " Berenyi v. District Director, Immigration and Naturalization Service, 385 U.S. 630, 636, 87 S.Ct. 666, 17 L.Ed.2d 656 (1967). See also, Workman v. Mayor, Etc., City of New York, 179 U.S. 552, 21 S.Ct. 212, 45 L.Ed. 314 (1900); International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42, note 7, 99 S.Ct. 2121, 60 L.Ed.2d 698 (1979). The rule is of even greater importance in this case because four of the witnesses for the respondents who are deaf, including Mr. and Mrs. Rowley, testified using total communication, which is visual in nature. Per force, Judge Broderick, and only Judge Broderick, was able to assimilate that testimony.

of the district court, [9]but no where do they say it is wrong. The district court's standard is bottomed in "equal educational opportunity." Both the petitioner Commissioner (TCCA 27, 30) and the petitioner school board (post trial brief in the district court, page 24) concede that handicapped children are entitled to an equal educational opportunity.[10]

---

[9] During the oral argument before the court of appeals, the attorney for the school board stated:

> The District court's standard was that each handicapped child be given an opportunity to achieve full potential commensurate with the opportunity given to other children. The District Court went on -- because I frankly think that we have no great disagreement with that standard as a standard per se . . . (TCCA 33).

[10] The petitioners have omitted from their petition the Findings and Purpose section of the Education of the Handicapped Act, as amended by the Education for All Handicapped Children Act of 1975. That section is set out:

The petitioners chide Judge Broderick for formulating a definition of "free appropriate public education"

Section 601. Findings and Purpose.

"(a) This title may be cited as the 'Education of the Handicapped Act'.

"(b) The Congress finds that-

"(1) there are more than eight million handicapped children in the United States today;

"(2) the special educational needs of such children are not being fully met;

"(3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

"(4) one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

"(5) there are many handicapped children throughout the United States participating in regular school programs whose handicaps prevent them from having a successful educational experience because their handicaps are undetected;

"(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at a great distance from

when there is a definition set out in the Education of the Handicapped Act, 20 U.S.C. § 1401(18). But that is

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their residence and at their own expense;

"(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of handicapped children;

"(8) State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children; and

"(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

"(c) It is the purpose of this Act [this chapter] to assure that all handicapped children have available to them, within the time periods specified in section 612(2)(B) a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped

not a functional definition; it provides no guidance to judges in their consideration of controversies involving "the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education." 20 U.S.C. § 1415(b)(1)(C). Cf. Battle v. Commonwealth of Pennsylvania, 629 F.2d 269, 276 (Third Circuit, 1980). Thus

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children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children."

Judge Broderick was obligated to formulate a standard based upon the legislative history of the Education for All Handicapped Children Act of 1975, Public Law 94-142, and the standard so formulated is in complete accord with the Act and its legislative history.[11]

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[11] Inasmuch as these papers are not supposed to review the merits of this controversy, it is respectfully suggested that this Court refer to the respondents' (plaintiffs-appellees') brief to the court of appeals. pages 15 to 36.

It is interesting to note that neither petitioner so much as suggested that there existed a statutory definition of free appropriate public education prior to their briefs filed in the court of appeals. Indeed, each petitioner offered material to assist Judge Broderick in the formulation of the proper standard (at page 18 of its trial memorandum, the petitioner school board set forth the definition of "appropriate education" established in the regulations promulgated under section 504 of the Rehabilitation Act of 1973, 45 CFR § 84.33(b)).

The petitioners question Judge Broderick's consideration of expert testimony. A Federal judge is called upon to hear and decide

controversies covering the entire spectrum of human activity. No judge, not anyone, can be so well versed that he is able to render judicious decisions on all matters before him without the presentation of expert testimony to acquaint him with the field in which he is called upon to decide.[12] The respondents called five experts for that purpose -- four of whom had and have personal knowledge of Amy Rowley.[13] The

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12 " . . . [I]t is the very purpose of expert testimony to assist the trier of the facts (in this case, a court sitting without a jury) to understand, evaluate and decide the complex evidential materials in the case." United States v. R.J. Reynolds Tobacco Co., 416 F. Supp. 313, 315 (DNJ, 1976).

13 Mrs. Rowley, Amy's mother, is a certified teacher of the deaf with six years experience. She testified to and submitted documentary material on her observation of Amy in class over a one week period.

petitioners called three experts for that purpose. In addition, Judge Broderick received two parent initiated independent educational evaluations (20 U.S.C. § 1415(b)(1)(A) and 45 CFR § 121a.503(c)) prepared by two experts in the education of deaf children. Having reviewed and assimiliated that expert testimony,

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Mr. Taras B. Denis, an Administrator at the New York School for the Deaf, testified to the fact that he has known Amy all her life.

Dr. Ann Barbara Kligerman, Director of the Speech and Hearing Clinic of the Westchester County Medical Center, testified that she has been testing Amy's hearing periodically for at least five years.

Dr. Martin L.A. Sternberg, Professor at the New York University Deafness Research and Training Center, testified that he spent several hours with Amy during the spring of 1979 to gauge her communication skills.

Judge Broderick applied the standard mandated by the Education for the Handicapped Act. He determined that, based upon Amy's upbringing, her parents' wishes,[14] and her level of comprehension of oral communications with and without the use of total communication, Amy had proved by a preponderance of the evidence presented her right to the relief requested in her complaint.

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[14] An individualized education program, 20 U.S.C. § 1401(19), is a written statement, developed by, among others, the child's parents, 483 F. Supp. 530, setting forth ". . . the specific educational services to be provided to such child. . . "

The petitioners seek to raise the issue of cost. That is a novel, self-serving, speculative issue, not supported by any evidence presented below, contrary to the purpose and legislative history of the 1975 Act (Senate Report No. 94-168, page 8, reprinted in 1975 United States Code Congressional and Administrative News, page 1432), and based upon a misunderstanding or misreading of the opinions below. The April 10, 1979 decision of the Commissioner of Education does not indicate in any way that cost is a relevant consideration in the provision of a free appropriate public education. During the final pre-trial conference, the attorney for the petitioner school board told Judge Broderick that cost is not a factor in this litigation (a point

reiterated at the pre-argument conference conducted by Staff Counsel, pursuant to section 5 of the Civil Action Management Plan of the Court of Appeals for the Second Circuit). Neither petitioner sought to introduce any evidence relevant to cost at the hearing held on September 26, 27, and 28 and October 4, 1979. Neither petitioner referred to cost in its trial or post trial brief. Neither petitioner referred to cost in the court of appeals. "The fact that this asserted basis of liability is so obviously an afterthought may be some indication of its merit, but since it was neither pleaded, argued, nor briefed either in the District Court or the Court of Appeals, we will not consider it." Miree v. DeKalb County, Georgia, 433 U.S. 25, 33-34,

97 S.Ct. 2490, 53 L.Ed.2d 557 (1977). See also, Duignan v. United States, 274 U.S. 195, 200, 47 S.Ct. 566, 71 L.Ed. 996 (1927); United States v. Lovasco, 431 U.S. 783, 788 note 1, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977); and Lawn v. United States, 355 U.S. 339, 362 note 16, 78 S.Ct. 311, 2 L.Ed.2d 321 (1958). The reason for this rule is obvious. This is a court of review; it reviews only issues raised in courts below. Were that not true, every unsuccessful litigant would do what the petitioners here seek to do -- at every step of the appellate process, they would conjure up new arguments as substitutes for or additions to the arguments found unpersuasive in courts below. The petitioners seek not review of the lower court opinions, but relitigation

of this case.

In the final analysis, what the petitioners have argued is that they, and not Amy's parents, should determine how Amy is to be raised (petitioner school board's brief to the court of appeals, page 25). That is contrary to our culture, Federal statutory law,[15] and Federal common law.[16]

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15 Section 101(3) of the Department of Education Organization Act, 20 U.S.C. § 3401(3), states:

> "[P]arents have the primary responsibility for the education of their children, and States, localities, and private institutions have the primary responsibility for supporting that parental role."

16 See Meyer v. Nebraska, 262 U.S. 390, 399-403, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 534-535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting).

Despite the oft-repeated admonishment that parties ought not to seek appellate review solely because they dislike a decision, where there is no substantial controversy of a legal nature, the petitioners have appealed the decision of the district court relentlessly, notwithstanding that they have not raised a substantial legal question.

That assertion can only be termed silly in this case, where both parents are themselves deaf, both are, nevertheless, college graduates and professionals, and one is an experienced certified teacher of the deaf (see note 14, supra).

4. RESPONDENTS EXHAUSTED ALL ADMINISTRATIVE REMEDIES PRIOR TO INITIATING SUIT.

The petitioners concede that the district court had jurisdiction to review Amy's educational program for school year 1978-79. However, they[17] argue that upon the completion of school year 1978-79, the matter became moot and that the court could

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17 At no prior stage in the proceedings has the petitioner school board contested the jurisdiction of the district court. Indeed, at the commencement of the hearing in this case, the attorney for the school board stated:

> It makes little sense to me to have to go back, to go through the Committee hearings -- well, the Committee has already made its determination -- to go through the independent hearing officer, to go through the review of the Commissioner when basically the facts haven't changed. That is a conclusion, and again, that is something that your Honor will have to determine as a result of this hearing. But it is my feeling that the facts haven't changed

not have jurisdiction under 20 U.S.C. § 1415(e)(2) for school year 1979-80 until all administrative procedures set forth in section 1415 had been completed with relation to Amy's IEP for school year 1979-80. Inasmuch as those procedures would not be completed until after the end of school year 1979-80, by the time of their completion the matter would again be moot and it would be necessary to start again during school year 1980-81, ad infinitum. In essence, the petitioners argue that the procedural

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substantially. Transcript ("T"), page 17.

During the oral argument before the court of appeals, the attorney for the school board conceded that the district court has jurisdiction to grant the relief requested and granted. TCCA 41-42.

safeguards established to protect the rights of parents of handicapped children, which culminate in judicial review, effectively preclude such review. It is hornbook law that courts shall not interpret Congressional statutory language in such a manner as to render it meaningless and ineffective. United States v. Monasche, 348 U.S. 528, 538-539, 75 S.Ct. 513, 99 L.Ed. 615 (1955); Bird v. United States, 187 U.S. 118, 124, 23 S.Ct. 42, 47 L.Ed. 100 (1902); Federal Trade Commission v. Manager, Retail Credit Co., Miami Branch Office, 515 F.2d 988, 994-995 (District of Columbia Circuit, 1975).

Amy Rowley is deaf; barring the discovery by medical science of a cure for deafness, she will be deaf for the rest of her life. Her parents

will object to any arrangement, in any school year, that fails to provide her with the services necessary to enable her to understand what is said in her classroom, despite her deafness. Thus, administrative procedures and judicial review in any school year would involve consideration of the exact same question: What services must Amy receive to compensate for her deafness?

Were the argument of the petitioners to be adopted, no court would ever be able to review Amy's IEP for any school year. Where jurisdiction exists, as it does here, it does not terminate when there is a likelihood that the same situation will be repeated again in the future. The well recognized exception to the mootness doctrine, as enunciated by this Court,

assures that an aggrieved individual will be entitled to his day in court. Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 514-515, 31 S.Ct. 279, 55 L.Ed. 310 (1911); Nebraska Press Association v. Stuart, 427 U.S. 539, 546, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976); Roe v. Wade, 410 U.S. 113, 123-125, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

The Act, 20 U.S.C. § 1415(e)(2), grants jurisdiction to Federal district courtswith respect to the original complaint filed thereunder "and all matters relating thereto" (Senate Conference Report No. 94-455, page 50, reprinted in 1975 United States Code Congressional and Administrative News, page 1503; and 121 Congressional Record S 37416, November 19, 1975), and to grant any

appropriate relief. By the passage of the 1975 Act, Congress sought to assure that the parents of disabled children would not have to go to court continually to protect the rights of their children, not that those parents would be denied access entirely to the courts of this country. Senate Report No. 94-168, page 9, reprinted in 1975 United States Code Congressional and Administrative News, page 1433.

Even assuming, arguendo, the correctness of the argument of the petitioners, it is a recognized principle of law that a party need not exhaust administrative remedies when such action would be futile. See, for example, Porter County Chapter of the Izaak Walton League of America, Inc. v. Costle, 571 F.2d 359, 363 (Seventh Circuit, 1978).

During the Senate Floor debate on the conference report on S. 6 of the 94th Congress, the Education for All Handicapped Children Act, Senator Williams, the Floor Manager, said:

> Mr. President, with regard to complaints, I want to underscore that the exhaustion of administrative procedures established under this part should not be required for any individual complainant filing a judicial action in cases where such exhaustion would be futile either as a legal or practical matter . . .
> 121 Congressional Record S 37416, November 19, 1975.

In this case, the Commissioner of Education has taken an adversary position, he has compromised his office, solely for the purpose of denying the plaintiffs the relief they seek. Were the Commissioner to review this matter for a second time, his decision would be a foregone conclusion.

The court of appeals specifically

rejected the petitioner Commissioner's argument of lack of jurisdiction.

5. THE COURT OF APPEALS DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The judges of the court of appeals acted in accordance with their responsibilities under Canon 3(A)(5) of the Code of Judicial Conduct.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

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No. 80-1002

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Petitioners,

—against—

AMY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY in their own right,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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QUESTION PRESENTED FOR REVIEW

Whether Respondents have misrepresented the issues which this court is being asked to review.

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OCTOBER TERM, 1980

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Petitioners,

-against-

AMY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY in their own right,
Respondents.

* * *

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

* * *

PETITIONERS' REPLY BRIEF

REASONS FOR GRANTING THE WRIT

1. The Petition addresses critical issues of law; i.e., the definition of free appropriate public education under the Act.

Certiorari should be granted. The issues presented to this Court are not, as Respondents allege, merely issues of fact, but critical questions of statutory construction which have direct and immediate effect throughout the State of New York, and the nation; and involve whether the District Court had the power to formulate a definition of "free, appropriate public education" under the Education of All Handicapped Children Act of 1975, 20 U.S.C. 1401 et seq. ["Act"], and if it did, whether its definition is proper.

The Petitioners have asked this Court to review whether the Court of Appeals, in affirming the District Court's decision, has created an unworkable defini-

tion of free appropriate public education, whether it has approved an improper and unworkable test for compliance with that definition, and whether it has condoned judicial disregard for the roles of the Federal Commissioner and the State Educational Agency as delineated by the Act.

While it is possible to construe the goal of the Act as the provision of equal educational opportunities to all children, the District Court transmuted that goal into a definition. That definition, and the test for conformity to it, create an unworkable scheme, which is already being cited with approval by other Courts (see Petition, P. 18-19). The fact that the decision of the District Court was affirmed by the Court of Appeals gives the scheme additional precedential value.

The District Court mistakenly held

that the Act contained no definition, thereby freeing it to define "appropriate education" to mean:

> that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children. (A-C 10). 483 F.Supp. 528, 534.

The Court went on to state that this definition requires:

> that the potential of the handicapped child be measured and compared to his or her performance, and that the resulting differential or "shortfall" be compared to the shortfall experienced by non-handicapped children. (A-C 13-14). 483 F.Supp. 528, 535.

This judicially created method for evaluation of the appropriateness of the education provided to the handicapped demands measurements of "potential" and "shortfall" which are impossible to implement.

The definition and its required test

fail to provide guidance to local and state educational agencies. There is no feasible method by which an educational institution can measure the "shortfall" from full potential for either handicapped or non-handicapped pupils. There are no tests at present which measure "shortfall", and it is not clear from the District Court's opinion how it derived that term. While there is a wide body of scientific and educational knowledge on the subject of academic testing, there appears to be no accepted method for making the measurements required by the Court.

The Court took no testimony, and it did not cite any evidence in its opinion, which would demonstrate that it was necessary to create a test to measure "shortfall" in order to implement the Act. The Court's struggle to formulate a working

definition and test arose from its failure to realize that the Act provides a definition. See U.S.C. 1401 (18).

The District Court's definition enlarges the scope of judicial review in a manner never contemplated under the Act. It places upon the state and federal courts the burden of determining whether in each case the state or local educational agency has measured the shortfall from potential of all handicapped and non-handicapped children in a given population, whether the tests are appropriate measures of that shortfall, and whether the shortfall of the handicapped children from their potential is greater than that of their non-handicapped peers, all before reaching a decision in any case brought under the Act.

2. The Court erred in basing its decision on the needs of a class, rather than on the individual needs of a handicapped pupil.

The District Court formulated its decision post trial, despite the Petitioner School District's motion to dismiss on the ground, among others, that it was in compliance with the Act. Since the testimony taken by the District Court did not address itself to the definition and tests enunciated in its opinion, the court could not apply its definition and tests to the evidence. Instead, it based its decision to provide the student with a sign language interpreter on testimony that all deaf students receive some benefit from sign language interpreters. That result contradicts the explicit provision of the Act, 20 U.S.C. 1401(16), which mandates that special education shall be designed to meet the unique in-

dividual needs of each handicapped child.

If the Court's decision is allowed to stand, educational determinations over the needs of handicapped children will be based on needs common to a class of handicapped pupils, rather than to the needs of individual children, in direct contradiction to the mandate of the Act.

The Respondents adopted a philosophical approach to their proof to butress their argument that all deaf children should receive interpretive services in school. They did not want to address the question of how well the individual student was doing without the interpreter, as it was their position that every deaf child, including their daughter, could do much better if the School District could be compelled under the Act to make the service available.

In this context it is important to

note that at the first stage of the review procedure, viz., before the independent hearing officer, the entire direct case by the Respondents, represented by counsel, consisted of eleven pages of testimony, and established four facts: 1) that the student has a form of deafness, 2) that the parents wanted a sign language interpreter in her regular second grade classroom, 3) that the parental demand reflected the opinion of a number of experts in the field of education of the deaf, and 4) that her academic and social success in the classroom were irrelevant in the absence of an interpreter. (R-A 17-28).

This approach was also used in the District Court where the Respondents presented only expert testimony, applicable to all deaf students, on the educational desirability of interpreters, except for

the disputed and contested affidavits.

The decision of the District Court required substitution of a method of education based on the perceived needs of the class "deaf students" for a method of education which was based on Amy Rowley's individual needs, which yielded successful results, and which was in conformity to the state plan.

The issue here is not whether a conflict exists between the New York State plan and the Federal statutory scheme. Petitioners do not contend that the New York State plan prohibits provision of sign language interpreters for deaf children, if a determination that such services are necessary is made by either the local educational agency,[1] an inde-

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1. The Hendrick Hudson Central School District evaluated the unique needs of Amy Rowley and developed an Individualized

pendent hearing officer, or the State Commissioner. However, the Federal Commissioner has approved New York State's plan which does not mandate that service in light of the other service provided to deaf pupils.

Petitioners are asking this Court to address the following issue. Given the mandate for provision of services designed to meet the unique needs of the individual child, and the lack of a requirement in the State plan for provi-

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Educational Program for her which included not only the services of a certified teacher of the deaf five times a week, but also the services of a speech therapist three time a week and use of an F.M. Wireless. The District utilized a sign language interpreter for a two-week period, but deemed the service unnecessary because the student ignored the interpreter, and focused her attention on her teacher, whom she could understand. (R-A, 38-41, 164-166).

sion of interpreters to all deaf children, is it the prerogative of federal courts to order provision of interpretive services solely on the basis of testimony that all deaf children would benefit from such services?

3. The District Court erred when it ignored the role of the State plan in the determination of whether the School District was providing a free appropriate public education.

Respondents allege that the Petition for the Writ of Certiorari raised the issue of allocation of costs for the first time. This is untrue. The issue was raised in the Briefs to the Court of Appeals for the Second Circuit by the Petitioner Commissioner (p.21) and the Amicus Curiae New York State School Boards Association (p. 27-28).

Under the Act, it is left to each State to allocate its limited resources as it sees fit, provided that its plan for such allocation has been approved by the Federal Commissioner. 20 U.S.C.1413

As Senator Javits noted during Senate floor debate, a balance must be drawn between:

> "budgetary constraints under which State educational systems operate, and the long-term benefits to be gained by the earliest possible services to handicapped children". (121 Cong. Rec. 37417).

If, as the Court below suggests, a district must establish that a handicapped child is learning all she could be learning if she were not handicapped, that balance is completely lost. There will be no limit to the amount and kinds of services which must be provided unless and until the court is satisfied that the particular student involved is performing up to his or her potential. All of these demands will be made in the context of current fiscal belt-tightening on the part of states, local school districts, and the public.

Education today is still primarily a state and local matter, and since the educational needs of all children are

substantial, and the costs of meeting them even greater, hard decisions must be made at the state and local level as to standards and priorities. These decisions must include what will be taught and in what context. The decision of the District Court, however, strives toward maximization of the potential of all handicapped children and mandates that all deaf children receive a certain service. Such a decision strikes at the very heart of educational decision-making at the state and local level. School districts should not be held financially accountable for the achievement of the potential of handicapped children when no such requirement exists for the non-handicapped. Variations in the maturity, abilities and family backgrounds of all children make this an impossible goal. All that should be

required is the provision of an adequate education to all children in a setting which allows them to acquire academic expertise, social skills and moral values necessary to become members of society.

Recognition of the right of handicapped children to equal protection of law should not lead to a judicial definition of the nature of the educational program for all children with a particular handicapping condition based on a blanket philosophy of educational needs, and in derogation of the federally approved State plan. To do so would shift very basic educational decision-making into a forum which the courts themselves have recognized to be inappropriate. (San Antonio Independent School District v. Rodriquez, 414 U.S. 1, 93 S.Ct. 1287, 36 L.Ed. 2d 16 (1973); Milliken v.Bradley, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed

2d 1069 [1974]; Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 226, 21 L.Ed 2d 228 [1968]).

The Act contains a specific procedure for invalidation of State plans, and court action by individuals is not a part of it. One of the functions of the Federal Commissioner is review and approval of state plans. He is empowered to invalidate such plans, and to withhold funding from states for non-compliance with the mandates of the Act. If he does so, the state is entitled to seek judicial review. 20 U.S.C. 1413, 1416.

In order to reach its definition of free appropriate public education, given the nature of the testimony, the court had to determine a fundamental legal principal under the Act, i.e., who determines what is a free appropriate public education. After it determined

that there was no definition under the Act, the court said:

> Aside from the HEW regulations quoted above, it has been left entirely to the courts and the hearing officers to give content to the requirements of an "appropriate education". (Emphasis supplied) (A-C 11) 483 F.Supp. 528, 534.

In effect, the District Court took testimony from experts on the education of deaf children, formulated its own State plan and applied it to the case before it. While arguments can be made that the court's plan was a good plan, the development of plans has been left to the states; and evaluation of whether those plans are in compliance with the Act is clearly left to the Federal Commissioner of Education, not to the individual district courts or independent hearing officers, as held by the District Court in its opinion.

CONCLUSION

Wherefore, Petitioners respectfully requests that the Petition for a Writ of Certiorari to the Court of Appeals for the Second Circuit be granted.

Dated: February 11, 1981

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No. 80-1002

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, AND THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, PETITIONERS

v.

AMY ROWLEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the district court properly determined by a preponderance of the evidence that sign-language interpreter services should be included in the "free appropriate public education" to be provided to respondent Amy Rowley under the Education of the Handicapped Act.

2. Whether an individualized education program devised for a particular handicapped child satisfies the requirements of the Education of the Handicapped Act solely by virtue of the fact that it does not conflict with any express provision of the relevant state plan submitted to the Secretary of Education under 20 U.S.C. 1413.

3. Whether the district court had jurisdiction to grant injunctive relief extending beyond the school year covered by the individualized education program for which respondents sought judicial review.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1002

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, AND THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, PETITIONERS

v.

AMY ROWLEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation of February 23, 1981.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-24) is reported at 632 F. 2d 945. The district court's findings of fact and conclusions of law (Pet. App. C-1 to C-24) are reported at 483 F. Supp. 528. The district court's memorandum concerning petitioners' motion to dismiss for lack of jurisdiction (Pet. App. D-1 to D-7) is reported at 483 F. Supp. 536.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1980. The petition for a writ of certiorari was

filed on December 15, 1980. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

This case involves Part B of the Education of the Handicapped Act, 20 U.S.C. 1401, 1411 *et seq.*, as amended by the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773. The principal provisions of the Act are set forth in Pet. App. I.

STATEMENT

The State of New York receives federal funds under Part B of the Education of the Handicapped Act, 20 U.S.C. 1401, 1411 *et seq.* As a statutorily-required condition of receiving these funds, New York has agreed to provide a "free appropriate public education" for all school-age handicapped children in the State and has filed with the Secretary of Education a state plan describing the way in which that obligation will be fulfilled. 20 U.S.C. 1412(1), (2)(B), 1413.[1] Under the Act, a public educational authority (usually the local school district) must prepare an annual "individualized education program" for each handicapped child within its jurisdiction. 20 U.S.C. 1414(a)(5); see also 20 U.S.C. 1401(8), (22). This program, also known as an IEP, is a written statement describing the specially designed instruction and services that the school district intends to provide to meet the unique needs of the particular handicapped child involved. See 20 U.S.C. 1401(19).

Respondent Amy Rowley is a deaf child enrolled at a public school within the Hendrick Hudson Central School District in Westchester County, New York. In December

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[1] In Section 301(a)(1) and (a)(2)(H) of the Department of Education Organization Act, 20 U.S.C. (Supp. III) 3441(a)(1) and (a)(2)(H), Congress transferred the administration of the Education of the Handicapped Act from the Commissioner of Education to the Secretary of Education.

1978, Amy's parents, also respondents in this Court, challenged the school district's failure to provide for a sign-language interpreter in the IEP prepared for Amy for the academic year 1978-1979, during which Amy was in the first grade. When the school district's Committee on the Handicapped refused to modify the IEP, the Rowleys sought and obtained administrative review under 20 U.S.C. 1415(b)(2) and (c). The school district's refusal to provide a sign-language interpreter was sustained first by an impartial hearing officer within the school district and then by the petitioner state Commissioner of Education (Pet. App. F-1 to F-25, E-1 to E-6). Respondents then brought this lawsuit in the United States District Court for the Southern District of New York, seeking judicial review of those administrative decisions in accordance with 20 U.S.C. 1415(e)(2). They contended that the school district's failure to provide a sign-language interpreter for Amy denied her the "free appropriate public education" to which she is entitled under the Act.

The district court did not hear evidence in the case until September and October 1979, when the 1979-1980 academic year had already begun and Amy had advanced to the second grade (Pet. App. B-1). At the time of trial, the required IEP had not yet been prepared for Amy for the new academic year (*id.* at D-3). Petitioner, the New York Commissioner of Education, argued that respondents' request for injunctive relief had become moot with the expiration of the 1978-1979 academic year and that the district court lacked jurisdiction to award injunctive relief for 1979-1980 or any subsequent academic year until an IEP had been prepared for that year and available avenues of administrative review had been exhausted. The district court rejected this position on the ground that the alleged inadequacy in Amy's IEP for 1978-1979 was "capable of repetition, yet evading review" and therefore "call[ed] for the invocation of a recognized exception to the mootness

doctrine" (*ibid.*). The court concluded that it retained jurisdiction over respondents' challenge to the 1978-1979 IEP and that, under 20 U.S.C. 1415(e)(2), it was "empowered to grant any 'appropriate' relief, * * * which would include injunctive relief extending beyond the school year at issue" (*ibid.*).

Turning to the merits, the district court found (Pet. App. C-2 to C-9) that respondent Amy Rowley is a deaf child with some residual hearing ability. Her residual hearing is particularly good in the lower frequencies, where vowel sounds are distinguished. She is an excellent lipreader. Amy's parents are also deaf. They have raised Amy through the use of "total communication"—a relatively new system of education for the deaf involving the simultaneous mouthing and signing of words, as well as the use of amplification, touching, and visual cues.

During the 1977-1978 academic year, when Amy was in kindergarten, the school district provided her with an FM wireless hearing aid and, in addition, conducted a two-week experiment with a full-time sign-language interpreter. At the conclusion of this trial period, the interpreter determined that Amy did not need his services for the kindergarten class. For the 1978-1979 academic year, the school district's Committee on the Handicapped recommended that Amy be provided with (a) continued use of the FM wireless hearing aid; (b) tutoring services for one class hour daily; and (c) the services of a speech therapist for three hour-long sessions each week. The Committee decided that Amy did not need the services of a sign-language interpreter.

By all accounts, Amy is a bright, well-adjusted child who interacts well with her classmates and teachers and is successful in her studies. Her achievement test scores are above the class median. The district court found (Pet. App. C-7 to C-8), however, on the basis of auditory speech discrimination tests, that, when Amy uses only her hearing aid and her

lipreading ability, she can identify only 59% of the words spoken to her, whereas when she uses the "total communication" method, including a sign-language interpreter, she can identify 100% of the words addressed to her. The court therefore determined (*id.* at C-8 to C-9) that Amy "is not learning as much, or performing as well academically, as she would without her handicap." The court accepted petitioners' evidence that "an interpreter is less necessary for the transmission of mechanical skills in the early grades than for the increasingly academic instruction of higher grades," but it found nevertheless that "anything missed in the classroom early in the learning process will have far reaching consequences" (*id.* at C-9). Finally, the district court found that "an interpreter could be integrated into the classroom in a way which will not disrupt the class or adversely affect Amy's social interaction" (*ibid.*).

Under the Education of the Handicapped Act, as interpreted by the district court, "each handicapped child [must] be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children" (Pet. App. C-11). Focusing on the testimony of the principal at Amy's school to the effect that "only [Amy's] academic failure would convince the school district that she needed the services of an interpreter" (*id.* at C-12), the court ruled that petitioners applied an incorrect legal standard in determining that the services of a sign-language interpreter were not an essential part of Amy's IEP. The court stated that petitioners improperly ignored "the importance of comparing [Amy's] performance to that of non-handicapped students of similar intellectual calibre and comparable energy and initiative" (*id.* at C-13). Because of the deficiencies in Amy's understanding as revealed by the speech discrimination tests mentioned above, the court concluded that, without a sign-language interpreter, Amy falls farther short of her educational potential than do her peers.

The court referred to the testimony and affidavits of respondents' experts as additional support for the inferences drawn from the speech test results. The experts stated, largely without contradiction, that "there is a marked trend towards the use of total communication in the education of the deaf—a trend supported by studies showing the greater degree of success of students brought up in deaf households using total communication" (Pet. App. C-16). The court commented that, to the extent Amy has managed to make academic progress without the assistance of a sign-language interpreter, her success is attributable in large measure to her superior abilities and should not be permitted to obscure the critical fact that the IEP designed for her by petitioners provides her with less opportunity to reach her potential than is offered to her non-handicapped classmates. The district court therefore ordered petitioners to provide Amy with the services of a sign-language interpreter "during any school period in which academic subjects are taught" (*id.* at B-1).

A divided panel of the court of appeals affirmed in a per curiam opinion (Pet. App. A-1 to A-24). The court ruled that the district court's findings of fact were not clearly erroneous and that its conclusions of law were correct. Accordingly, the court relied primarily on the district court's detailed opinion, stressing in particular its agreement with the finding that "Amy misses a substantial part of what goes on in her classroom" and needs a sign-language interpreter in order to bring her educational opportunity up to the level of the opportunity offered to her non-handicapped classmates (*id.* at A-6). The court concluded by emphasizing that this case is not a class action and that the decision rests completely on evidence concerning "a particular child, her atypical family, her upbringing and training since birth, and her classroom experience" (*id.* at A-7). As a consequence of the court of appeals' affirmance

of the district court's order, petitioners provided Amy Rowley with the services of a sign-language interpreter for the 1980-1981 academic year.

Judge Mansfield dissented, primarily on the ground that the district court's interpretation of "free appropriate public education" was derived improperly from a regulation promulgated under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and deferred insufficiently to the views of state and local authorities regarding the content of Amy's IEP. In Judge Mansfield's opinion, Congress did not seek, in the Education of the Handicapped Act, to ensure that each handicapped child have the same opportunity to reach his potential as is afforded to non-handicapped children. Rather, Congress was concerned simply with providing "an education for each handicapped child that would enable the child to be as free as reasonably possible from dependency on others, would enable the child to become a productive member of society, and would hopefully promote academic achievement by the child that would roughly approximate that of his or her nonhandicapped classmates" (Pet. App. A-19).

DISCUSSION

1. The petition for a writ of certiorari should be denied. This case involves only the review of an IEP prepared for a particular handicapped child. The decision below turns on the factual findings of the district court, which were sustained by the court of appeals and do not warrant further review. There is no conflict among the circuits concerning the proper standard to be applied in determining whether a given IEP satisfies the statutory requirement that the handicapped child involved be provided a "free appropriate public education." On the contrary, this is the first case, to our knowledge, in which an appellate court has ruled on whether a particular instructional service is required for an

individual handicapped child in order that her education be "appropriate." The court of appeals has expressly disclaimed any precedential significance for its holding, stating that the decision "is not intended as authority beyond this case" (Pet. App. A-7). The intervention of this Court therefore is not necessary in the present situation. Further developments in the courts of appeals can be expected to provide additional guidance regarding the proper implementation of the Act with respect to individual handicapped children, and postponement of this Court's consideration of the "free appropriate public education" requirement seems desirable for this reason as well.

2. Apart from the prudential factors mentioned in the preceding paragraph, review should not be granted because the decision below appears consistent with the Education of the Handicapped Act, as construed in applicable regulations. Although the district court inaccurately stated that "[t]he Act itself does not define 'appropriate education' " (Pet. App. C-9), the fact is that the statutory definitions of the relevant terms do not explain what is meant by "appropriate," and courts called upon to review the content of an IEP, in accordance with 20 U.S.C. 1415(e), will inevitably be required to make a judgment, on the basis of the evidence presented, concerning whether the educational methods proposed by the local school district are appropriate for the handicapped child involved. See 20 U.S.C. 1401(18) ("free appropriate public education"); 20 U.S.C. 1401(16) ("special education"); 20 U.S.C. 1401(17) ("related services"); and 20 U.S.C. 1401(19) ("individualized education program").

The district court in the present case recognized that for children like Amy, whose intellectual capacity is unimpaired, an "appropriate" education could mean an "adequate" education (*i.e.*, one that enables a handicapped student to progress from grade to grade and eventually earn a high school diploma) and that it could also mean an education that "enables the handicapped child to achieve his or

her full potential" (Pet. App. C-11). The court concluded, however, that the proper standard is one that lies between these two extremes—one that requires that the handicapped child be given the same opportunity to achieve his or her full potential that is given to his or her non-handicapped peers. The court explained (*ibid.*):

> Since some handicapped children will undoubtedly have the [intellectual] ability to do better than merely progress from grade to grade, this standard requires something more than the "adequate" education described above. On the other hand, since even the best public schools lack the resources to enable every child to achieve his full potential, the standard would not require them to go so far.

Accord, *Springdale School District No. 50* v. *Grace*, No. 80-1777 (8th Cir. Aug. 7, 1981). See also Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 Harv. L. Rev. 1103, 1125-1127 (1979).[2]

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[2]This case is not like *Battle* v. *Pennsylvania*, 629 F. 2d 269 (3d Cir. 1980), cert. denied *sub nom. Scanlon* v. *Battle*, No. 80-827 (June 22, 1981), because the court of appeals there found it unnecessary to evaluate the content of an IEP prepared for a particular handicapped student. The court in *Scanlon* reviewed, not an individual decision by a local school district with respect to a single student, but an across-the-board state policy limiting the number of days of instruction that could be provided to any student. Without addressing the specific needs of any individual handicapped child, the Third Circuit ruled that the state's inflexible policy was inconsistent with the Act's emphasis on tailoring each IEP to the "unique needs" of the affected handicapped child.

Scanlon is further distinguishable from the present case because the handicapped respondents in *Scanlon* all suffered from severe mental impairments or emotional disturbances and therefore could make only the most limited form of educational progress. Accordingly, whatever the merits of the district court's emphasis in *Scanlon* (see 80-827 Pet. App. 48a) on enabling handicapped students to achieve the maximum

There is a substantial basis for the court of appeals' conclusion that this view appears to have stronger support in the language and legislative history of the Act than the alternative standards advanced by petitioners and by Judge Mansfield in his dissenting opinion in the court of appeals.[3] In contrast to their position, the statute speaks of the provision of a "*full* educational opportunity to all handicapped children." 20 U.S.C. 1412(2)(A)(i) (emphasis added); see also, *e.g.*, 121 Cong. Rec. 19482-19483 (1975) (remarks of Sen. Randolph); *id.* at 19505 (Sens. Humphrey and Beall); *id.* at 23703-23705 (Rep. Brademas); *id.* at 25538 (Rep. Cornell); *id.* at 37025 (Rep. Perkins); *id.* at 37410 (Sen. Randolph). Of course, as the district court recognized (Pet. App. C-11), Congress did not intend to require "the best possible education that a school could provide if given access to unlimited funds." Note, *supra*, 92 Harv. L. Rev. at 1125. But, the Act does "guarantee that handicapped children are provided *equal* educational opportunity." S. Rep. No. 94-168, 94th Cong., 1st Sess. 9 (1975) (emphasis added); see also, *e.g.*, 121 Cong. Rec. 19483 (1975) (remarks of Sen. Stafford); *id.* at 19494 (Sen. Javits); *id.* at 19504 (Sen. Humphrey); *id.* at 19505 (Sen. Beall); *id.* at 23704 (Rep. Brademas); *id.* at 25540 (Rep. Grassley); *id.* at 37030, 37031 (Rep. Mink); *id.* at 37412 (Sen. Taft); *id.* at 37413 (Sen. Williams); *id.* at 37418-37419 (Sen. Cranston); *id.* at 37419-37420 (Sen. Beall). And this means equal opportunity in practice, not just as a matter of theory unrelated to the needs of particular handicapped children.

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possible degree of self-sufficiency and independence from others, that decision is not inconsistent with the district court's conclusion in the present case that the Act seeks to provide handicapped students with an opportunity to fulfill their potential equivalent to the corresponding opportunity available to their non-handicapped classmates.

[3]Petitioners argue that "[t]he Act was intended to enable the handicapped to become functioning members of society, insofar as their handicapping conditions allow" (Pet. 15). Judge Mansfield's view is set forth at Pet. App. A-19. See also page 7, *supra*.

In view of the legislative emphasis on equality of opportunity, it was reasonable for the court of appeals to conclude that Congress did not intend an interested and intellectually superior student like Amy Rowley to be provided with an education that enabled her to achieve at a level only slightly above the average for her class. Rather, it appears that one of Congress' objectives in enacting the statute was to insure that the talents of handicapped children would not be squandered but would be developed in the same way as those of their non-handicapped counterparts. This goal appears as applicable to gifted handicapped children as it does to those less intellectually able.

In light of the congressional concern with equality of educational opportunity, the district court properly looked to the regulations promulgated under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, for assistance in determining the meaning of the phrase "free appropriate public education," as it is used in the Education of the Handicapped Act and as applied to Amy Rowley. There is no reason why, as a matter of legal principle, regulations issued under one statute may not be consulted in the interpretation and application of another closely-connected statute, at least where the latter statute and the regulations promulgated under it are silent on the precise issue in question. Indeed, the regulations under the Education of the Handicapped Act that were in effect at the time of the district court's decision explicitly required that each annual state plan submitted to the Secretary of Education under 20 U.S.C. 1413 include an assurance that the program would be operated in accordance with the Secretary's Section 504 regulations.[4] See 45 C.F.R. 121a.150 (1979).[5] Accordingly,

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[4]HEW's regulations under Section 504, codified in 45 C.F.R. Part 84, have been reissued by the Department of Education and codified in 34 C.F.R. Part 104.

[5]This regulation was revoked in April 1980 and was replaced by more generally applicable regulations to the same effect. See 45 C.F.R.

the district court's reliance (Pet. App. C-9 to C-10) on 45 C.F.R. 84.33(b) in reviewing the content of Amy Rowley's IEP was entirely proper.

Once the district court's standard of review under the Act is accepted, there can be little doubt, given the court's findings of fact, that its conclusion regarding the adequacy of respondent Amy Rowley's IEP was justified. The court found that Amy is a bright, highly motivated, and energetic child with an IQ of 122, who nevertheless can identify less than 60% of what is said in the classroom. The court further found that, using only her hearing aid and her lipreading ability, Amy "is not learning as much, or performing as well academically, as she would without her handicap" (Pet. App. C-8 to C-9). Primarily on the basis of these findings concerning Amy's individual situation, the court concluded that Amy's IEP should include the services of a sign-language interpreter.[6]

In reaching this conclusion, the court also considered expert testimony regarding "the superiority of total communication as a tool of education" (Pet. App. C-15). Petitioners object (Pet. 39-40) to the court's review of such evidence on the ground that the Act requires educational decisions to be based on the "unique needs" of each handicapped child and that, therefore, generalized information regarding the education of the deaf is irrelevant, or at best only marginally relevant, to the content of a particular child's IEP. As the district court recognized (Pet. App. C-15 to C-16), however, the needs of an individual child cannot be assessed intelligently "without reference to generally

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100b.201, 100b.500 (1980). The latter regulations, in turn, have been reissued by the Department of Education and will be recodified at 34 C.F.R. 76.201 and 76.500. See 45 Fed. Reg. 77368 (1980).

[6]The court's decision did not imply any conclusion about what, if any, remedy would be appropriate if Amy, using only her hearing aid and lipreading ability, had understood a significantly higher percentage of what was said in the classroom.

accepted methods of special education for the handicapped." Children with the same kind of handicap will likely share some of the same needs, and nothing in the Act or in common sense requires school districts or courts to ignore the available general learning concerning the education of students with a particular disability.

3. Petitioner's argument (Pet. 21-33) that the complaint should have been dismissed because Amy Rowley's IEP conformed with the New York state plan submitted under 20 U.S.C. 1413 is easily answered. The free appropriate public education to which Amy Rowley is entitled consists of special education and related services that meet each of four conditions, 20 U.S.C. 1401(18), none of which is required to be addressed by the state plan. See 20 U.S.C. 1412(2) and 1413. Even if the "standards of the State educational agency" referred to in 20 U.S.C. 1401(18)(B) were set out in the State plan, and even if Amy Rowley's education met those standards, neither of which has been established on the record, the services provided to her would not be appropriate if they failed to satisfy any other provision of 20 U.S.C. 1401(18). Compliance with the state plan by itself, therefore, is not a sufficient defense to a charge that a school district has failed to provide an appropriate education to a handicapped child. Although a particular state plan may not require school districts to provide sign-language interpreters for their deaf pupils (see Pet. 26), the question remains whether such services are necessary to satisfy the requirement of "an appropriate preschool, elementary, or secondary school education" (20 U.S.C. 1401(18)(C)) or the requirement that "special education" be "specially designed * * * to meet the unique needs of a handicapped child" (20 U.S.C. 1401(16)). This is precisely the question addressed by the district court, and that court did not err in failing to dismiss the complaint on the basis of petitioners' alleged compliance with the state plan.

The Secretary of Education's approval of the New York state plan under 20 U.S.C. 1413(c) does not establish that a "free appropriate public education" for a particular student need not include the provision of a sign-language interpreter in the classroom. Although the New York plan does not specifically *require* school districts to provide interpreters, neither does it *prohibit* them from doing so (see Pet. 26). The plan simply does not address the question; it leaves to local school districts the initial decision regarding which services are appropriate to the needs of their deaf pupils. The Secretary's approval of the state plan therefore cannot properly be construed as sanctioning the refusal to provide a sign-language interpreter to Amy Rowley or to any other deaf pupil. Nor can the decision below properly be construed as "set[ting] aside" the state plan (*id.* at 22).

4. Notwithstanding petitioners' contention to the contrary (Pet. 41-48), the district court was empowered to grant injunctive relief extending beyond the academic year for which respondents sought judicial review. 20 U.S.C. 1415 (e)(2) provides in pertinent part (emphasis added):

> In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, *shall grant such relief as the court determines is appropriate.*

The district court correctly ruled that respondents had exhausted their administrative remedies with respect to Amy's 1978-1979 IEP and that, because the deficiencies in the IEP were "capable of repetition, yet evading review," the court retained jurisdiction to grant relief, despite the expiration of that school year. See *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911); *Roe* v. *Wade*, 410 U.S. 113, 125 (1973); *Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 546 (1976). The court did *not* hold, as

petitioners assert (Pet. 45-46), that it had jurisdiction over Amy's IEP for the 1979-1980 academic year, even though that IEP had not yet been prepared and even though respondents' administrative remedies had not yet been exhausted for that year. Rather, applying its broad remedial authority under Section 1415 (e)(2), the court ordered injunctive relief extending into the 1979-1980 school year on the ground that "Amy needs an interpreter just as much (if not more) in 1979-80 as she did in 1978-79" (Pet. App. D-3).

To hold that such relief is not "appropriate" under the circumstances presented here would render the *Southern Pacific* doctrine meaningless. Since the administrative and judicial processes together take well over nine months to complete, those processes will never be completed during the same academic year for which a challenged IEP has been prepared. Therefore, unless courts have the power to grant injunctive relief extending beyond that year, a plaintiff would be able to obtain a judicial declaration that a feature of his previous IEP violated the Act, but he would be unable to correct the problem prospectively. The error could be repeated and could still evade any review that could result in meaningful relief for the handicapped student.

Moreover, although the district court did not address the question, it in fact did have jurisdiction over Amy's 1979-1980 IEP, despite the lack of exhaustion as to that program. Failure to exhaust administrative remedies under the Act does not bar suit "when resorting to state procedures clearly would be futile." *Armstrong* v. *Kline*, 476 F. Supp. 583, 602 (E.D. Pa. 1979), remanded on other grounds *sub nom. Battle* v. *Pennsylvania*, 629 F. 2d 269 (3d Cir. 1980), cert. denied *sub nom. Scanlon* v. *Battle*, No. 80-827 (June 22, 1981). Accord, *Harris* v. *Campbell*, 472 F. Supp. 51, 54 (E.D. Va. 1979); *Loughran* v. *Flanders*, 470 F. Supp. 110,

112 (D. Conn. 1979).[7] Because the school district's refusal to provide for a sign-language interpreter as part of Amy's 1978-1979 IEP was sustained throughout the administrative review of that program, and because the school district continued to maintain in the district court that no interpreter services would be necessary in the absence of academic failure by Amy (Pet. App. C-12), exhaustion of administrative remedies with respect to the 1979-1980 program would have been futile. The district court therefore had jurisdiction over that IEP without the necessity of additional state procedures.[8]

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[7]The legislative history of the Act demonstrates that this result was contemplated by Congress. See 121 Cong. Rec. 37416 (1975) (remarks of Sen. Williams):

> [E]xhaustion of the administrative procedures established under [the Act] should not be required for any individual complainant filing a judicial action in cases where such exhaustion would be futile either as a legal or practical matter. * * *

[8]If injunctive relief extending beyond the school year were deemed not "appropriate" within the meaning of 20 U.S.C. 1415(e)(2), exhaustion would also be futile in that it would preclude consideration by the courts at a time when they could render meaningful relief.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court of the United States

OCTOBER TERM, 1980

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Petitioners,

—against—

AMY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY in their own right,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

The principal questions presented for review are:

1. Whether the Court of Appeals misconstrued the function of a state plan for "free appropriate public education," approved by the Federal Commissioner of Education under the Education of all Handicapped Children Act of 1975 (20 U.S.C. 1401 et. seq.), when it failed to order dismissal of a Complaint to provide an interpreter for a deaf student, upon demonstration by the local school district that it was in conformity with the state plan.

2. Whether, assuming the Act mandates a provision of a "free appropriate public education," the

standard promulgated by the District Court and adopted by the Court of Appeals is erroneous under the Act.

3. Whether, assuming the Act mandates a provision of a "free appropriate public education," the Court of Appeals erroneously upheld the decision of the District Court, which was based, not on the unique needs of the Respondent, but on a particular philosophy of the education of the deaf.

4. Whether the federal courts have jurisdiction to hear cases arising under the Act, prior to completion of the administrative procedures contained in the Act.

5. Whether the attempt by Court of Appeals to limit the applicability of

its decision to the facts of this case constituted error.

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding before the Court of Appeals and the District Court. There are no additional parties.

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A-1 to A-24)[1] is reported at 632 F.2d 945. The order of the Court of Appeals denying the Petition for Rehearing (Pet. App. H-1 to H-3) is not reported. The opinion (Findings of Fact and Conclusions of Law) of the District Court (S.D.N.Y.) (Pet. App.

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[1]Citations to "J.A." are to the Joint Appendix filed with this Brief; Citations to "Pet. App." are to the Appendices to the Petition for Writ of Certiorari; Citations to "R-A", "R-T", and "R-E" are to the Record (Appendix, Transcript, and Exhibits, respectively) submitted to the Court of Appeals for the Second Circuit, and certified and transmitted to this Court.

C-1 to C-24) is reported at 483 F.Supp. 528, and the District Court's memorandum opinion and order (Pet. App. D-1 to D-7) are reported at 483 F.Supp. 536. The District Court's order denying the School District's Motion to Dismiss the Complaint (R.A.-346) is not reported. The memorandum order of the District Court ordering the School District to retain a "qualified" rather than a "certified" interpreter (J.A. 384-386) is not reported. The decision of the New York State Comissioner of Education is contained in the Appendix to the Petition at E-1 to E-6), and the decision of the Independent Hearing Officer is contained in the appendix to the Petition at F-1 to F-25.

JURISDICTION

The Judgment of the Court of Appeals was entered on October 1, 1980. The Petition for a Writ of Certiorari was filed on December 15, 1980. This Court granted the Petition for the Writ of Certiorari on November 2, 1981. This Court's jurisdiction is invoked under 20 U.S.C. §1254(1).

STATUTE INVOLVED

This case involves Part B of the Education of the Handicapped Act, 20 U.S.C. §1401, §1411, et. seq., as amended by the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773. The principal provisions of the Act, and

pertinent sections of the Regulations promulgated under it, 45 C.F.R. Part 121a.(now renumbered as 34 C.F.R. Part 300) are reproduced in the Appendix to the Petition to the Writ of Certiorari.

STATEMENT OF THE CASE

In September, 1977, Amy Rowley entered the Furnace Woods Elementary School, in the Hendrick Hudson Central School District, as a kindergarten pupil. Before her schooling commenced, her parents visited the school, requested that she be placed in a regular kindergarten class, and asked the Principal and the School District Administrators to do what they thought necessary to integrate her into a mainstream classroom.

In anticipation of her arrival, the Principal and many of the school's teachers took a sign language course in order to better communicate with Amy, who was the School's only deaf pupil. (R.A. 33-46, R.A. 159-161). The District purchased a teletype machine

for the school's office, in order to communicate with Amy's parents, who are also deaf. (Pet. App. C-4; 483 F.Supp. 528, 530).

Amy's parents agreed with the District that her kindergarten year was to be a data gathering trial period, during which an assessment of Amy's educational needs would be made. (R.A. 32-37; 483 F.Supp. at 530). She was tested and her hearing level determined. Amy was found to have significant residual hearing in the lower frequencies and to be able to distinguish vowel sounds without amplification (J.A. 299).

She was first provided with no special assistance. Then several hearing aids were tried. The system ultimately selected was an Earmark FM

wireless, a discrete sound amplification device which amplifies only the sound spoken into the microphone unit, thereby blocking out background noise. The microphone can be used by the teacher and the other pupils in Amy's class (R.A. 33-36).

In order to determine whether Amy could benefit from a sign language interpreter, the District placed an interpreter in her class for a two week period from February 27, to March 10, 1978. The educators who evaluated Amy's performance while the interpreter was in the classroom, including the interpreter, Jack Janik, who was a certified teacher of the deaf, all concluded that interpretive services were not useful for Amy (R.A. 40-44).

Despite their manifest agreement

that the kindergarten year would be a trial period, Amy's parents, without the prior knowledge of the District, filed a Complaint with the Department of Health, Education and Welfare, alleging that the District's failure to provide a sign language interpreter in her classroom was a violation of §504 of the Rehabilitation Act of 1973. (29 U.S.C. §701, et seq.) However, after an investigation which included observations of Amy's class, HEW found no violation (J.A. 155-156, R.A. 324-326).

Taking into account what had been learned about Amy during her kindergarten year, the District Committee on the Handicapped, in October, 1978, drew up a program to provide an appropriate education for

Amy. After consulting experts suggested by the Rowleys, listening to Amy's parents and reviewing material submitted by them, visiting Amy's classroom and classrooms in other school districts where deaf children were taught, the Committee recommended that Amy be placed in a regular first grade classroom; that she be provided with the continued use of the Earmark FM wireless; and that she receive the services of a certified teacher of the deaf one hour each day, and the services of a speech therapist three hours per week. This plan was then incorporated into Amy's individualized education program ["IEP"]. (R.T. 22-24). The IEP is reproduced at R.A. 173-196.

Amy's parents disagreed with the recommendation and with the IEP, on the ground that Amy was not provided with a sign language interpreter. They appealed the Committee's determination to an Independent Hearing Officer. [2]

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[2]The Committee made its decision on October 3, 1978. The Rowleys filed a Notice of Appeal to the Independent Hearing Officer (pursuant to 8 N.Y.C.R.R. §200.5), but then asked the Committee to consider an Affidavit which they deemed essential, but were unable to procure by October 3. The Rowleys did not submit the Affidavit until late November. The Committee met again on December 11 to consider the affidavit, and adhered to its original determination. The hearing before the Independent Hearing Officer was held on December 20; his decision was rendered on January 12, 1979. R.A. 282-286.

Testimony was taken at the hearing from witnesses for the Rowleys and for the School District. The Hearing Officer upheld the Committee's determination, on the ground that Amy had achieved excellent educational, academic, and social progress.[3]

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[3]The Rowleys were represented by counsel before the Committee, and before the Independent Hearing Officer. Their direct case before the Hearing Officer (J.A. 24-39) consisted of testimony by three witnesses, the substance of which was that Amy was deaf and her parents wanted an interpreter in her class. In his decision, the Hearing Officer noted that the Rowleys presented no evidence to him on Amy's educational, academic or social progress, while the District had presented extensive and convincing testimony that her performance in those areas was excellent. (Pet. App. F-22).

The Rowleys appealed to the New York State Commissioner of Education, who upheld the Committee's determination on April 10, 1979.[4]

On April 24, 1979, the Respondents commenced an action against the School District in the United States District Court for the Southern District of

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[4]The Respondents submitted to the Commissioner three Affidavits (J.A. 91-121) which contradicted the testimony given by the Rowleys before the Hearing Officer, and which denigrated Amy's classroom performance and adjustment. The Commissioner did not specifically exclude the Affidavits, but based his decision on "a review of the Record before the Hearing Examiner." (Pet. App. D-4) The District Court excluded the Affidavits when the Rowleys attempted to admit them at the conclusion of trial, but reversed itself in a post trial memorandum decision (Pet. App.D 1-7).

New York. The Complaint alleged that the District had failed to provide Amy with an education "coterminus with her non-handicapped peers" in violation of the State Act (N.Y. Education Law §§ 4201-4210, 4351-4257, 4401-4409 (McKinney's); 8 N.Y.C.R.R. §§200.01 et seq.); §504 of the Rehabilitation Act of 1973; (29 U.S.C. §§701, et. seq.); and The Education of All Handicapped Children Act of 1975 (20 U.S.C. §§1401 et. seq.) and §1983 (42 U.S.C. §1983).[5]

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[5]At the District Court Trial, the Respondents only advanced their claim under the Education of All Handicapped Children Act and appear to have abandoned their other claims.

The District moved to dismiss the Complaint on the grounds that the Respondents had failed to name a necessary party, the Commissioner; that the Commissioner was the only proper defendant since his decision was independent under the Act; that the District was in full compliance with the State Plan as set forth in the State law and regulations, which did not require an interpreter; and that the allegation that Amy's education was not "coterminus" was insufficient to establish jurisdiction. (R.A. 315-323)[6]

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[6]The School District's allegation that the Complaint should be dismissed on a showing that it had complied with the State plan is contained in its Reply Memorandum of Law. (R.A. 332-333).

The District Court denied the Motion, without addressing any of the issues raised by the District, except that it ordered the New York State Commissioner of Education added as a party. The Rowleys and the District (the Commissioner had not yet been joined as a party) stipulated that the Court's judgment over Amy's 1978-79 placement would be binding on the parties for the 1979-80 school year.[7]

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[7]The original Complaint was filed on April 24, 1979. An Amended Complaint was served on May 31, 1979. The District's motion to dismiss the Complaint was served on June 18, and the hearing was held on July 15. On August 15, the Rowleys moved for a preliminary injunction. On return of the Motion, on August 17, the Court said it would not decide the Motion

At the hearing on the preliminary injunction, the Commissioner objected to the Court's jurisdiction, on the ground that no determination for the 1979-80 school year could be made without the Commissioner's prior review of that school year, which had not occurred. The Court denied the Motion. At the conclusion of the hearing on the Motion for the preliminary injunction, by stipulation, it was deemed a trial on the merits.

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without a hearing, which is scheduled for September 29. The Court also said it would shortly issue a decision adding the Commissioner as a party, which it did on August 22. The Stipulation was made on August 17, the return date of the motion to dismiss. By that time the Committee on the Handicapped had already determined Amy's placement for the 1979-80 school year, with no change. The Stipulation was limited to that year. (R.T. 14-16).

On December 28, 1979, the District Court issued an order reversing the decision of the Commissioner of Education and ordering the District and the Commissioner to provide Amy with the services of a certified interpreter for the deaf (Pet. App. B-1). The District Court then issued two separate opinions stating its findings of fact and conclusions of law. (Pet. App. C.1-24, 483 F.Supp. 528; Pet. App. D.1-7, 483 F.Supp. 536).

The Court held there was no statutory definition of "free appropriate public education" (Pet. App. C.9, 483 F.Supp. at 533) and that consequently it was free to formulate its own definition, i.e., that each handicapped child be given an opportunity to achieve a full potential

commensurate with the opportunity provided to other children. (Pet. App. C.11, 483 F.Supp. at 534).

The Court said that its standard required the School District to measure the potential of the handicapped child, compare that potential to his performance, and compare the resulting shortfall to the shortfall experienced by non-handicapped children (Pet. App. C.11-12, 483 F.Supp. at 534). It held that no evidence had been received to determine or compare Amy's shortfall from potential, and it was thus free to order provision of an interpreter for Amy because "every deaf child hears better in class with an interpreter." (Pet. App. C.15, 483 F.Supp. at 535).

In a separate opinion (Pet. App. 1-7, 483 F.Supp. 536) the Court held

that the Commissioner had no right to review the determination for the 1979-80 school year prior to the Court's review. The Court said that, given the necessity for review by an independent hearing officer and the Commissioner of Education, the case would not reach the Court until the middle of the school year, and would be moot by the end of the year, thus making it capable of repetition, yet evading review. The Court also said that in any case predicated on 20 U.S.C. §1415 (e)(2) the Court had power to grant "appropriate" relief, which would include injunctive relief extending beyond the school year at issue. (Pet. App. D.3, 483 F.Supp. at 538).

In its separate opinion, the Court also ruled that three Affidavits

submitted to the Commissioner, which were explicitly excluded from the trial, (R.T. 396-397, 428-432) had been admitted post trial and considered by the Court, on the ground that the Commissioner had erroneously failed to consider them.

The School District and the Commissioner appealed. The majority of the panel of the Court of Appeals of the Second Circuit affirmed (Pet. App. 1-7, 632 F.2d 945), substantially for the reasons set forth in the District Court's opinion (Pet. App. A.6; 632 F.2d at 947). It said the Court below had meticulously and precisely applied the standard for free appropriate public education prescribed by Congress; it did not rule on the contested affidavits, stating that the

Respondents had proved their case without them. (Footnote 6 to the Court's opinion, Pet.App.A.7).

The affirmance was based on the purportedly unique facts of the case, and the Court invoked a Second Circuit Rule which precluded citation of its decision as authority in any other case. (Footnote 7 to the Court's opinion, Pet. App. A.7-8, 632 F.2d at 948).

Judge Mansfield dissented (Pet. App.A.8-24) on the ground that the District Court mistakenly formulated its own definition of an appropriate education, then misapplied its standard to reach a wrong result; ignored the role of the State Commissioner; ignored the role of the State Plan and the fact that it did not provide for an

interpreter; and denied the due process to defendants by admitting post trial the three contested affidavits which could not be cross-examined.

He criticized the definition of appropriate education as unfeasible, impractical, and impossible to use as a means of evaluating the appropriateness of a handicapped child's education. He praised the School District's "Herculean efforts" to provide Amy with an education suitable to and compensating for her hearing deficiency, which he said had met with "remarkable success." (Pet. App. A.11, 632 F.2d at 950).

Judge Mansfield said that the purpose of the Act was to forward the goal of self-sufficiency for handicapped persons, a result he said

would not occur if Amy was provided with an interpreter. He said application of the proper standard would have yielded one result, and that the action should have been dismissed.

A Petition for a Rehearing En Banc was denied, and a stay of the District Court's Order, granted shortly after the filing of the Notice of Appeal, was vacated. A Petition for a Writ of Certiorari was filed on December 15, 1980. On February 23, 1981, the Court asked the United States to submit its position on the Petition for the Writ. The United States submitted a Brief Amicus Curiae in September, 1981. Certiorari was granted on November 2, 1981.

SUMMARY OF THE ARGUMENT

The Act is a "funding statute". It did not create a federal right to free appropriate public education. That term describes the limitations of the state's undertaking when it submits its plan to the Secretary for the purpose of obtaining his approval as a condition for federal aid. In accepting federal funds, the states do not undertake to provide particular (i.e. "appropriate") methods of educating handicapped children. The Act's provisions for judicial review do not enlarge the scope of the states' obligations. The District Court should have dismissed the Complaint when the School District demonstrated that its program for the education of the Respondent was in conformity with the

State plan approved by the Secretary.

Assuming arguendo that there is an enforceable right to free appropriate public education, the definition adopted by the District Court is not authorized by the Act, and is an impractical and impossible test of the appropriateness of a handicapped child's education.

The District Court's definition of appropriate education left it incapable of assessing the Respondent's unique needs, as required by the Act. The District Court held that the Respondent was entitled to the services of a sign language interpreter by determining that all deaf children would benefit from that service. That method of determination violates the Act, and disregards the uncontested fact that

the Respondent was succeeding academically and socially without the service.

It was error for the Court to hold that the review provisions of the Act (1415(e)(2) gave it power to order injunctive relief for the 1979-80 school year, and beyond, prior to the completion of the administrative review required under the Act. The Court should have granted the Commissioner's motion to dismiss the Complaint for lack of jurisdiction, and should have awaited the completion of administrative proceedings before reaching a determination for the 1979-80 school year.

The Court of Appeals should not have used its rule limiting the applicability of Bench decisions, in order to sustain the result reached by

the District Court. The District Court's result was wrong, its method of determination erroneous, and the Court of Appeals should have reversed the decision and dismissed the Complaint.

ARGUMENT

1. The Court below should have dismissed the Complaint when the School District demonstrated that its individualized educational program for the Respondent was in conformity with the State plan.

The Courts below read the scope of the rights created by the Act too broadly, and exceeded their remedial powers in compelling the District and the Commissioner to provide the Respondent with a sign language interpreter in her regular class.

The Act did not create substantive individual rights to free appropriate public education. Pennhurst State School and Hospital v. Halderman, ____ U.S. ___, 101 S.Ct. 1531 (1981); McCowen v. Hahn, _ F. Supp. ____, 3 EHLR 533:131 (N.D. Ill. 1981). At the time Congress passed the Act, this Court had

decided San Antonio School District v. Rodriguez, 411 U.S. 1 (1973), in which it held that education was not a right accorded explicit or implicit protection under the Constitution. It is highly unlikely that Congress, in passing the Act two years after the Rodriguez decision, intended the Act to enforce rights in an area where there are serious Constitutional questions over the validity of imposing affirmative obligations on the states. Under the tests laid down in Pennhurst, legislation passed pursuant to Section 5 of the Fourteenth Amendment should expressly articulate such intent. The Act does not.

In its statement of findings and purpose under the Act, Congress said:

> (c) It is the purpose of this Act to assure that all handicapped

> children have available to them, with the time periods specified in section 612(2)(B), a free appropriate public education which emphasizes services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and local authorities to provide for the education of all handicapped children and to assess and assure the effectiveness of efforts to educate handicapped children.
> Pub. Law 94-142, 89 stat. 775, 1975.

The legislative history of the Act also demonstrates that Congress did not intend to create a federal right to free appropriate public education, if indeed it had the power to do so. The original Senate Bill stated that it was the purpose of the Act to "insure" that all handicapped children have available to them a free appropriate public education and to "insure" that the rights of the handicapped child are protected. The House amendments

changed that to "assure." The Senate bill also stated that the purpose of the Act was "to relieve the fiscal burden placed on States and localities" in providing for the education of handicapped children. The House amendments stated the purpose is "to assist States and localities" to provide for the education of handicapped children. The House amendments were incorporated into the law. S. Conf. Rep. No. 94-455, reprinted [1975] U.S. Code Cong & Ad. News 1480, 1482.

The Act is clearly a "funding" statute passed by Congress under the Spending Power of the Constitution, Art. 1 §8 cl.1. It does not create a substantive right to free appropriate public education on behalf of the individual plaintiffs. The purpose of

the Act is to make funds available to qualifying states to assist them in providing educational opportunities for the handicapped. Loughran v. Flanders, 450 F.Supp. 110, 113 (D.Ct. 1979); Eberle v. Board of Public Education, 444 F.Supp. 41, 43 (D.Pa. 1977), aff'd., 582 F.2d 1274 (3rd Cir. 1978).

While Congress may fix the terms under which it will disperse Federal monies, such legislation is in the nature of a contract. The legitimacy of the power of Congress to legislate under the Spending Power rests on whether the state voluntarily and knowingly accepts the terms of the contract. There can be no knowing acceptance if the state is unaware of the conditions or is unable to ascertain what is expected of it. Conditions imposed on the grant of

federal monies must be done unambiguously. Pennhurst State School and Hospital v. Holderman, _____ U.S. _____, 101 S.Ct. 1531 (1981).

In accepting the federal funds, the states did not undertake to provide a particular (i.e., "appropriate") method or methods of educating handicapped children. Nor did the states consent to a procedure whereby the courts, under the review power of the Act, would ultimately direct the states as to what education was appropriate, on a case by case basis, as contended by the Respondents.

The Act is quite clear that, in requiring the states to provide a free appropriate public education as a condition for the receipt of federal monies, the content of that education is left to the states. 20 U.S.C.

§1401(18). The requirement (20 U.S.C. §1412; 1413(c) that the Secretary of Education approve the state's plan is simply a prerequisite for the receipt of the funds under the Act, and does not convert the state's plan into a federal right to free appropriate education.

The Act's requirement that each state plan also include a provision to develop an individualized educational program suited to the unique needs of the individual handicapped child, does not remove the Act's provisions for a free appropriate public education from the category of a statement of federal policy, and impose an affirmative obligation on the states and the local school districts to provide a particular form of education for each child. That requirement simply means

that the state must demonstrate to the Secretary that its plan makes provision for educating handicapped children according to a system which is devised to investigate and evaluate individual needs. The details of the system are left to the states. The provisions of the law requiring the plan to contain such a system are in place to guide the Secretary on how he should exercise the discretion given him under the Act to evaluate the plans submitted to him.

The Act makes these distinctions quite clear in its definition of free appropriate public education:

> (18) The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State eduational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in

> conformity with the individualized education program required under Section 1414(a)(5) of this title. 20 U.S.C. 1401(18).

If it was the Act's purpose to create a federal plan of education, it would not have defined free appropriate public education as "special education and related services which . . . meet the standards of the State educational agency." 20 U.S.C. 1401(18)(B). It would have defined it as special education and related services which meet the standards of the Secretary (as set forth in his Regulations, or in some other fashion). It did not.[8]

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[8]This Brief does not address the issue of what limitations would exist if Congress had attempted to impose such an obligation upon the states under the Spending Power, since it is

In his dissent in this case, Judge Mansfield addressed the issue of the role of the state plan. He said:

> Thus the scope and range of an appropriate education is left primarily to the states, which are given broad authority to prescribe the details of educational policy in individual cases and must present specific plans for approval to the United States Commissioner of Education who, if he finds that a state's plan is not in conformity with the Act and federal regulations thereunder, may withhold funding, with the state given a right of appeal to a federal court of appeals, 20 U.S.C. Section 1416. See, e.g., Epperson v. Arkansas, 393 U.S. 97, 104

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the position of the Petitioners that the Act does not create such a requirement. Thus, the Petitioners have not addressed the "Constitutional difficulties" with imposing affirmative obligations on the states pursuant to the Spending Power. See Steward Machine Co. v. Davis, 301 U.S. 548, 585 (1937); Lau v. Nichols, 414 U.S. 563, 569 (1974).

> (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities").
>
> Pursuant to the Act, the State of New York has adopted parallel legislation and the State Commissioner has promulgated specific regulations which do not require provision of a sign language interpreter. Moreover the state's plan for education of handicapped children, which does not provide for sign language interpreters, has been approved by the federal Commissioner. In view of the approved plan's specificity with respect to audiology services, and the statute's policy in favor of administrative determination of what services are appropriate, a very strong showing is required to depart from that policy. The showing here does not meet that test. (Pet App. A-15 to A-20. 632 F.2d 945, 951

While Judge Mansfield's opinion did not reach the issue of what showing would be necessary to set aside the State's determination, the District Court was not troubled by such considerations, apparently accepting the theory that a new federal substantive right

enforceable by the courts had been created.[9] After an erroneous finding that the Act did not contain a definition of free appropriate

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[9]The Court adopted the reasoning set forth in the Harvard Law Review (Vol. 92: 1103-1127) which the Court cited for the proposition that the Act contained no definition of free appropriate public education. (Pet.App. C-10 to C-11). The note states that the Act gave the Courts and administrative hearing officers "broad authority to prescribe the details of educational policy in individual cases" (p. 1105). In a footnote to sustain that proposition, the note cited the remedial provisions of the Act, 20 U.S.C. 1415(e)(2) for the proposition that "a judge or hearing officer could order implementation of whatever program she deemed appropriate." (Footnote 37, p. 1108).

public education, and thus unaware of the state's role, and unaware that no substantive right had been created, the Court held:

> Aside from the HEW regulation quoted above, it has been left entirely to the courts and hearing officers to give content to the requirements of an "appropriate education." (Emphasis supplied) Pet. App. C-11; 483 F.Supp. 528, 534.

Under its reasoning the Court did not have to resolve the question of whether the School District was providing an appropriate education by inquiring whether its program was in conformity with the State's requirements. Instead, it created its own definition of free appropriate public education and applied that definition against the State and the District.

An analysis of the scheme of the Act reveals that "free appropriate

public education" is not a mandate to be filled out by the decisions of the hearing officers and the courts, but a "goal" which the state will strive to attain, given its resources and needs.

Once a state has demonstrated eligibility, it must then submit to the Secretary a plan demonstrating that the funds received will:

> . . . be utilized by the State or any of its political subdivisions, only in a manner consistent with the goal of providing a free, appropriate public education for all handicapped children . . . (emphasis supplied).
> 20 U.S.C. 1413(a)(2).

§1412(1), which requires the state to "qualify for assistance" by demonstrating to the Secretary that it has in effect a "policy" that assures all handicapped children the right to a free appropriate public education, does not create a "right" to a free

appropriate public education. That section only establishes a condition that each state must meet in order to qualify for Federal funds. McCowen v. Hahn, ___F.Supp. ____, 3 EHLR 533:131 (N.D. Ill. 1981). No right having been created, the Petitioners' determination not to provide a sign language interpreter did not deprive the Respondents of any statutory right. Id.

In effect, the complaint in this case challenged New York State's plan. The State's plan does not include provision of sign language interpreters for deaf pupils in regular elementary school classrooms; neither does it forbid such a service, if the local school district elects to provide the service. Whether that is a correct judgment is for the Secretary to

review, not the District Court. The Act contains specific procedures for invalidation of state plans, and court action by individuals is not a part of it. Individuals are not remediless, since the State must hold public hearings prior to submission of its plan. 20 U.S.C. 1412(7). The Secretary is empowered to withhold funding from states for noncompliance with the mandates of the Act. If he does so, the State is entitled to seek judicial review. 20 U.S.C. 1413, 1416.

In formulating its plan, the state has to take into account the resources it will devote to the various forms of remediation, the practicality and feasibility of those measures, and the likely efficacy of those measures, given the limitation of the state's

resources. The cost of interpretive services for Amy will be approximately $20,000-$25,000 per year, at current rates. An extension of that cost the similarly situated deaf students in the state would cost over $100 million dollars per year. In effect, the District Court took testimony from experts on deaf education, formulated its own state plan, and applied it to this case. While arguments can be made that the Court's plan was a good plan, the development of such plans has been left to states.[10]

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[10]There are approximately 7,000 deaf and hard of hearing pupils in New York. See Table D-1.1(B), 2nd Annual Report to Congress on the Implementation of Public Law 94-142 (U.S. Department of Education 1980), p. 162. The cost is an approximation which assumes group instruction.

Cost considerations, and the apportionment of tax revenues, will mean that different states will reach different results. Judge Sloviter, in his opinion (concurring and dissenting in part) in Battle v. Pennsylvania, 629 F.2d 269, 284, (3rd Cir., 1980), cert.denied. sub.nom. Scanlon v. Battle, 80-827, June 22, 1981, stated:

> I agree with both of my colleagues that the contours of the state's program must be defined by the state. It is the state which must determine which specific programs should be offered, how those programs must be structured, and how the delicate and intricate balancing of funds and resources between handicapped and non-handicapped children must be managed. In the process, different states may establish somewhat varying immediate goals as steps toward realization of the federal policy.

If, however, the District Court's opinion is correct, and it has been left entirely to the courts and hearing officers to determine what is

appropriate education, what fiscal or other limitations are placed upon the exercise of that discretion? Must the local school district do anything to ameliorate the adverse impact resulting from the disability, regardless of cost? That question has been answered in the affirmative by the Third Circuit. In Kruelle v. New Castle County School District, 642 F.2d 687, 694 (3rd Cir. 1981), the Court held:

> Under the Education Act, in contradistinction [to the Rehabilitation Act] schools are required to provide a comprehensive range of services to accomodate a handicapped child's educational needs, regardless of financial and administrative burdens [Footnote omitted] . . .

The Third Circuit cited the Second Circuit's opinion in this case for its rule that financial and administrative burdens are irrelevant. If that rule is correct, then Congress has created a

scheme of unlimited liability for the states and local school districts. However, there is nothing in the provisions of the Act which give notice to a state that in submitting its plan as condition for federal aid, it was obligating itself to such a massive undertaking. There is also nothing in the law which indicates that was Congress' intent.

There remains to be considered whether the scope of judicial review under the provisons of the Act has enlarged the liability of the states beyond the undertakings specified in the other sections of the Act. It is submitted that it does not.

§1415 of the Act requires the state to establish and maintain "guaranteed procedural safeguards" for handicapped children and their parents with respect

to the provision of free appropriate public education. This provision has been held to create a substantive right, but only to invoke the Act's procedural safeguards. McCowen v. Hahn, 533 EHLR, at 133.

In McCowen, the Court stated:

> That section [1415] creates the right to a hearing on any issue relating to the placement of a handicapped child, as well as the right to certain procedural safeguards. Moreover,the statute on its face requires exhaustion of administrative remedies; the right to bring an action in Federal court is limited to any party aggrieved by the agency decision. As other district courts have noted, this is a limited jurisdictional grant; "it only authorizes review of claims alleging (1) errors in the evaluation or placement of the handicapped student, or (2) a denial of the Act's numerous procedural safeguards." Loughran v. Flanders, 470 F.Supp. 110, 113 (D.CT.1979).

The District Court in this case took a different view. It expanded the scope of its review far beyond the limits of

that power as described in the Act.[11]

§1415(b)(1)(E) gives the parents the right to present a complaint with respect to any matter relating to the provision of a free appropriate public education; to process that complaint to the state pursuant to its procedures (§1415(b)(2); and, if aggrieved by the findings and decision of the state agency, to bring a civil action with respect to the complaint to a state or federal court (§1415(e)(2). That latter provision states:

> In any action brought under this paragraph, the Court shall receive the records of the administrative

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[11]In their Complaint, the Respondents alleged a violation of the procedural rights guaranteed by 1415, but did not offer any proof in that regard at the trial.

proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

In Anderson v. Thompson, _____ F.2d ____, 3 EHLR 533: 105 (7th Cir. 1981), the Court construed its power under §1415(e)(2) and said:

> Congress instead has designed a detailed and multilevel procedure through which an aggrieved parent can ultimately seek an appropriate program decision from the District Court. 533: at 108.

In effect, the Court held that the power to "grant such relief as the court determines is appropriate" gave it the power to devise an "appropriate" education. The two terms are not the same. The power to grant "appropriate relief", must be read in light of the fact that the Act is a funding statute, and creates no substantive right to an

appropriate education. In giving the courts the power to devise appropriate relief, the Act did not empower them to create new substantive rights or to order particular forms of education.

The procedural safeguards are in place to resolve questions over procedural regularity, such as procedures to determine correct diagnosis and correct classification as a handicapped child. The scope of the Court's jurisdiction is limited to such issues, which deal with whether, in a particular case, the state must devise an individualized education program for a particular child. It does not extend to determining what is the appropriate program, a task left under the Act to the states and the local school districts.

In its motion to dismiss the

complaint, the District asserted that its program for the Respondent was in accord with the State plan. J.A. 137-157. The Respondents did not contest this assertion, but contended that it was irrelevant. The District Court should have dismissed the complaint upon the District's motion.

2. The definition of free appropriate public education formulated by the District Court, and affirmed by the Court of Appeals, should be overturned.

Although a definition of free appropriate public education is contained in the Act and the Regulations promulgated thereunder, the District Court ignored that definition and formulated one which is unnecessary, which fails to conform to Congressional intent, and which is incapable of implementation.

The Act and regulations define free appropriate public education (20 U.S.C. §1401(18); 45 C.F.R. 121a.4), as well as its components: special education and related services.

The Act defines "special education" as follows:

> (16) The term "special education" means specially designed instruction, at no cost to parents

> or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.
> 20 U.S.C. §1401(16).

Related services are defined under the Act as follows:

> (17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.
> 20 U.S.C. §1401(17).

The regulations restate these definitions and amplify them. 45 C.F.R. 121a.(13)(14).

Taken together, these definitions delineate the scope of the education to

be provided to handicapped children under the Act.

The child's education must be provided without charge (i.e., free); it must include an appropriate preschool, elementary or secondary school education within the State, in conformity with the I.E.P. developed for the child (i.e., appropriate); and it must be provided at public expense, under public supervision and direction, and must meet the standards of the State educational agency (i.e., public). The child must receive, at no cost to the parents, instruction which is designed to meet his unique needs. Not only must classroom instruction and instruction in physical education be provided, but also instruction at home or in hospitals or institutions. The child must be provided with

transportation, developmental, corrective, and other support services, if such services are required in order to enable him to benefit from the specially designed instruction. Support services such as speech pathology, audiology, psychological services, physical and occupational therapy, and recreation must be provided if the handicapped child cannot benefit from his specially designed instructional program without them.

This definition does not set forth the specific educational program which must be provided to any individual child, and it would be irrational to expect it to do so. However, what it does do is to set up a framework within which state and local educational agencies can determine whether

particular instructional programs and supportive services enable individual handicapped children to benefit from their educational experience. Thus, the Act and Regulations contain a definition of free appropriate public education which clearly sets forth the Federal goals, while simultaneously enabling state and local educational agencies to fulfill the purpose of the Act by providing for the unique needs of the individual child.

The District Court disregarded the statutory delineation of the parameters of free appropriate public education, and mandated that

> Each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children.
> Pet. App. C-11; 438 F.Supp. 528, 534.

The Court then stated that this standard:

> Requires that the potential of the handicapped child be measured and compared to his or her performance, and that the resulting differential or "shortfall" be compared to the shortfall experienced by non-handicapped children. Pet. App. C11-12; id. at 534.

This definition, and the standard which must be applied in order to implement it, are not only unnecessary, but are inconsistent with the legislative intent. In fact, they far exceed the intended scope of free appropriate public education under the Act.

In 1975 the Senate Committee on Labor and Public Welfare issued its report on S.6 (which ultimately became the Education for All Handicapped Children Act of 1975), S. Rep. 94-168 (1975 U.S. Code Cong. & Ad. News p. 1425). The background portion of this

report reveals that the legislation was originally introduced as S. 3614 in May 1972, following two landmark court decisions establishing the right to an education for all handicapped children: Pennsylvania Association for Retarded Children (P.A.R.C.) v. Commonwealth of Pennsylvania, 334 F.Supp. 1357 (ED Pa 1971), 343 F.Supp. 279 (ED Pa 1972) and Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866 (DDC 1972). The decisions were cited with approval both in the Senate report and in H. Rep. 94-332, the House's committee report on its own version of the legislation.

P.A.R.C., supra was the first major suit focusing on the particular learning needs of mentally retarded children. It ultimately resulted in a consent agreement which established

that "each mentally retarded child must receive education and training appropriate to the child's capacity."

The use of the term "appropriate", however, must be viewed in terms of the facts of the case. Prior to the filing of the action, Pennsylvania excluded from attendance students found unable to profit from instruction.

The Court in P.A.R.C., supra, found, based on expert testimony, that all mentally retarded persons were capable of benefiting from some form of education. 334 F.Supp. at 1359. While it recognized that various additional services might be required, nothing in its decision implies that the standard to be utilized would be "maximization of potential" or anything approaching this.

The Court in Mills, supra, was primarily concerned with providing some educational services to those who had been previously excluded, and its order spoke of adequate alternative educational services, rather than maximization of potential. In fact, it appears that the Court clearly recognized that lack of sufficient funds would excuse a failure to provide all the services required by a handicapped child, so long as a disproportionate burden was not borne by the handicapped population. 348 F.Supp. at 876.

The Education for All Handicapped Children Act of 1975, commonly referred to as P.L. 94-142, replaced legislation which was passed the year before, P.L. 93-380, the Education Amendments of 1974, which contained the first

Congressional use of the term "appropriate" in relation to education. §612(d) of that Act required, inter alia, the states provide

> . . . (b) procedures to insure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped...

The term "appropriate" as used in this legislation is a limitation on the requirement of mainstreaming, rather than a mandate that certain services be provided to develop a child's potential.

A year later the Senate Committee on Labor and Public Welfare, in its report on S. 6 (S. Rep. 94-168) discussed the provisions in the 1974 Act regarding "appropriate education":

> Amendments enacted in Public Law 93-380 established basic due process procedures and protections,

> a priority for service to handicapped children who are not receiving an education, a prohibition on discrimination in testing, and provision of educational services in the least restrictive environment appropriate to the needs of the handicapped child. (emphasis supplied).

Again, it appears from the language of the Committee report that the term "free appropriate public education" related to the mainstreaming requirement in the 1974 Act rather than to the specific services to be provided. The term appropriate, therefore, referred only to where the child was placed.

The Congressional floor debate on S. 6 and on S. Rep. 94-455, the Conference Report in which a compromise between the two houses was reached, primarily consisted of prepared statements by members of Congressional

committees concerning the millions of handicapped who were not receiving educational services (See 121 Cong. Rec. S. 10955, 121 Cong. Rec.H. 11346, 121 Cong. Rec. S 20426 (1975). An examination of both the committee reports and the debates indicates that Congress intended only to end the exclusion of handicapped children from the educational process. Senator Stafford commented on the basic priorities of the legislation:

> Second, Mr. President, the Congress last year in Public Law 93-380, which revised and extended part B of the Education of the Handicapped Act, a priority was set for services for those children who were receiving no services. This full service goal has not yet been met.
> 121 Cong. Rec. 19483 (1975)

Senator Williams stated that:

> providing appropriate educational services now means that many of these individuals will be able to become a contributing part of our

> society, and they will not have to depend on subsistence payments from public funds.
> 121 Cong. Rec. 19492 (1975).

Senator Randolph concurred in this view and stated that passage of the bill would

> give these children the educational services they need to compete in today's changing world.
> 121 Cong. Rec. 37410 (1975).

In the debate in the House, Congressman Harkin said:

> With proper educational services provided now, at a young age, these children can become productive citizens, contributing to society instead of being left as burdens on our society.
> 121 Cong. Rec. 25541 (1975).

There is nothing in the floor debates or in the Conference Report which indicates that any member of Congress ever intended the legislation to encompass provision of an opportunity to achieve full potential.

The legislative history demonstrates that the District Court's definition is at variance with the purpose of the Act. The Act was intended to assure educational services to all handicapped children, in order that they could become independent, self-sufficient members of society, insofar as their handicapping conditions allow. It was not enacted to compel school districts to provide the handicapped with the opportunity to achieve maximum or full potential, however desirable that goal may be. It is clear that the legislative intent is provision of services which meet educational needs of the handicapped child, rather than provision of an opportunity to achieve full potential commensurate with the opportunity provided to other children.

Not only is the definition of free appropriate public education formulated by the District Court unnecessary and in derogation of Congressional intent, it is unworkable and requires application of an unfeasible standard. Adherence to the guidelines contained in the statutory scheme, evaluation of the educational needs of the individual child, and provision of instruction and support services designed to meet those educational needs, are the goals of the Act. If the judicially created definition is allowed to stand, the difficulty of determining whether an individual handicapped child is being educated in conformity with the Act will be compounded, rather than simplified. The words "potential" and "shortfall" will have to be defined, and a system for measuring them will

have to be devised. The District Court held that intellectual caliber is not the sole determinant of potential, and that energy, initiative, intellectual assertiveness, rapport with teachers, and interest in learning are also components. Pet. App. C13-14, 483 F.Supp. 528, 534-535. At the present time, there exists a wide body of scientific and educational knowledge on the subject of academic and psychological testing. However, tests to measure potential, and a student's shortfall from that potential, do not yet exist.

While an attempt to evaluate the potential of a single child would prove to be an extremely difficult task, it would probably not be insurmountable. It would take time, money and trained personnel, but it may be possible that

some formula which would come close to measuring it could be devised. However, to apply the same type of evaluative techniques to large groups of children would surely be an impossible task. Further, even if the schools designed a way to do it, the likelihood of parental objection to the subjection of their children to such exhaustive testing would arise.

Assuming arguendo, that shortfall from potential is measurable, how is the population against which the handicapped child's shortfall is to be judged to be determined? If the population is to be the children in the same class or school district, a handicapped child in a group of overachievers would receive maximum help, but one in a group of underachievers would be severely

deprived.

The District Court's definition enlarges the scope of judicial review in a manner never contemplated under the Act. It places upon the state and federal courts the burden of determining whether the state or local educational agency has measured the potential and shortfall from potential of the handicapped and non-handicapped children in a given population, whether the tests are appropriate measures of that shortfall, and whether the shortfall of the handicapped children from their potential is greater than that of their non-handicapped peers, all before reaching a decision in any case brought under the Act.

If it is to become the province of the Courts to direct state and local educational agencies to provide

handicapped children with an opportunity to achieve full potential, commensurate with the opportunity provided to other children, how are the aspects of potential which are outside the sphere of influence of the schools, and independent of them, to be handled? Given the factors which the District Court set forth as components of potential, one must ask, not only whether educational agencies are capable of providing such opportunities to any children; but also whether, in our society, that is a proper function of an educational agency. In New York State, most children attend school for six hours a day, 180 days per year. Factors which contribute to achievement of potential influence them during all their waking hours. Analysis of the effects of home life, relationships

with peers, family crises, and myriads of other circumstances on any child's ability to achieve potential, as well as compensation for the detrimental effects of any of those factors, is an impossible task, and certainly beyond the power of any educational agency.

Educational agencies have an obligation to provide each student with an opportunity to receive an education. This is true whether or not the student has a handicapping condition. The requirement under the Act, for provision of a free appropriate education, is a requirement that instruction and special services be designed for handicapped children, in order that they can benefit from the instruction provided, insofar as they are capable of so doing. Achievement of potential is a highly desirable

goal, but it is not the goal of the statute under consideration here; and the decision of the Court of Appeals, upholding the District Court's definition should be reversed.

3. The Court of Appeals erroneously upheld the decision of the District Court which was based, not on the unique needs of Amy Rowley, but on a particular philosophy of education of the deaf.

Under the Act, handicapped children are defined as those whose impairments mandate provision of special education and related services. 20 U.S.C. §1401(1), 45 C.F.R. §121a.5). Special education is defined as instruction specifically designed to meet the unique needs of the child. 20 U.S.C. §1401(16), 45 C.F.R. §121a.14(a)(1). The free appropriate public education which is to be provided to handicapped pupils must, inter alia, conform to an individualized education program which is especially designed to meet the unique needs of the child. 20 U.S.C. §1401(1)(16)(19).

The goal of the Act is provision of

an educational program which is based on evaluation of the unique needs of the individual child, and which is designed to meet those needs in the least restrictive environment.

The Hendrick Hudson Central School District assessed the unique needs of Amy Rowley; placed a sign language interpreter in her kindergarten classroom for a two week trial period; reviewed audiological test results and documents on education of the deaf provided by her parents; and evaluated her academic achievement, as well as her interaction with her teacher and peers. After careful analysis of the resulting data, the District's Committee on the Handicapped concluded that, due to her good residual hearing in the lower frequencies, her excellent lipreading ability and her rapport with

her teachers and peers, provision of a sign language interpreter was not a service which would appropriately meet Amy's unique needs. Her parents objected to this determination.

Mr. and Mrs. Rowley are proponents of the philosophy of education of the deaf known as total communication. Testimony of Respondents' witnesses at both the Hearing before the Independent Hearing Officer and at the District Court trial can be reduced to a syllogism: all deaf children benefit from the presence of a sign language interpreter in their classrooms; Amy Rowley is deaf; therefore, Amy Rowley would benefit from the presence of a sign language interpreter in her mainstream classroom. In contrast, Petitioners' witnesses, who had observed Amy in her classroom,

testified extensively as to her understanding of what transpired in the classroom, and her academic achievement.

Dr. Norman Doctor testified to an experiment in which he told a story to Amy, while Dr. Edmund Cortez signed the words. He stated that Amy paid attention only to him, and ignored Dr. Cortez' signing. J.A.229-230.

The most detailed and exhaustive testimony on how Amy functions in class was given by the noted audiologist, Dr. Ann Mulholland, who said that Amy's hearing in the low frequencies is close to normal. J.A. 302. She testified that when Amy was called from behind by her teacher, Amy turned around to face her. J.A. 267-268. The same phenomenon was observed by another expert, Marianne Pappas, a year prior,

in Amy's first grade class. J.A. 42.

The testimony by Ms. Pappas (J.A. 40-51) and Dr. Mulholland (J.A. 251-306; R-T 343-392) about their verbal interaction with Amy in each of two academic years is moving and startlingly convincing evidence that Amy understands all of what is transpiring in her class. It was unrebutted.

Dr. Mulholland's testimony left no doubt that Amy is succeeding. Amy can read and spell (J.A. 258-260); she communicates with the children around her (J.A. 262); she can do mathematics and help the children who are having difficulty (J.A. 263-269); she is comfortably and gracefully accepted by her teacher and fellow students (J.A. 274-276); and she scores well on both class and achievement tests (J.A.

277-282). Dr. Mulholland said that a sign language interpreter was not needed (J.A. 282), and might be harmful. J.A. 282-285. She said she felt that she had sufficient information to make a valid judgment, and that on the basis of her clinical experience Amy's education was appropriate and adequate. J.A. 276, 309; R-T 393-392.

The testimony of the School District's witnesses also showed beyond doubt that the goals developed for Amy as part of her individualized education program were met. (Those goals are stated in the IEP found at R-A 173-195).

After formulating its own definition of free appropriate public education, the District Court found that standard too difficult to apply. It therefore ignored all testimony as

to Amy's outstanding academic achievements, performance in class, and ability to comprehend what was taking place in the classroom; it focused instead on testimony as to general theories of the benefits of total communication to the deaf. The Court of Appeals affirmed the District Court's decision "substantially for the reasons set forth in Judge Broderick's well reasoned opinions" Pet. App. A-6; 632 F.2d 945, 947. However, the reasoning employed by the District Court in reaching its decision was clearly contrary to the manifest intent of the Act.

While the Act mandates provision of a special education designed to meet the unique needs of the handicapped child, the District Court ignored voluminous testimony concerning the

unique needs of Amy Rowley, and stated:

> . . . it is useful to consider Amy as a member of a class of similarly handicapped children, a class about which a good deal of useful information is available. The plaintiffs' experts established by their testimony, which was in this respect largely uncontradicted, that there is a marked trend towards the use of total communication in the education of the deaf -- a trend supported by studies showing the greater degree of success of students brought up in deaf households using total communication. Pet. App. C16, 483 F.Supp. 528, 535.

Another school of philosophy on education of the deaf exists, known as the Oral School, and Petitioners could have introduced quantities of testimony as to theories that deaf children with good residual hearing in the lower frequencies and excellent lip reading skills can benefit most from emphasis on the use of these skills, rather than the presence of a sign language

interpreter.[12] However, rather than presenting extensive testimony on the opposing school of education of the deaf, Petitioners emphasized the unique strengths and weaknesses of Amy Rowley in their presentations to both the Hearing Officer and the District Court. The Act does not mandate application of philosophies on education of particular categories of

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[12]Testimony of Dr. Ann Mulholland (J.A. 290-293). A.M. Mulholland (ed.) Oral Education Today and Tomorrow. Washington, D.C.: The Alexander Graham Bell Association for the Deaf, 1981. W.H. Northcott. Freedom Through Speech: Every Child's Right. The Volta Review, 1980, 83(3), 162-181. H.S. Lane. The Profoundly Deaf: Has Oral Education Succeeded? The Volta Review, 1976, Reprint No. 76M, 329-340.

handicapped students; rather, it mandates assessment of the unique needs of an individual handicapped child, in order to provide free appropriate public education for that child. Each child is a unique creature with his or her own abilities and deficits. Merely because a child fits into a particular category, due to one asset or disability, that does not mean that he or she is identical to all other children who can be similarly categorized. There are different kinds and degrees of disabilities within any given classification of handicapping conditions, and every child learns in a different manner and at a different rate, whether or not the child is classified as handicapped.

To require a sign language interpreter for a mainstreamed deaf

child as a result of testimony as to a certain philosophy of education of the deaf, is to totally disregard the individual needs and strengths of the particular child. While some deaf children can communicate only through signing, others make use of residual hearing and lip reading, and would be disadvantaged by reliance upon an interpreter.

Amy Rowley achieved academic success, received above grade level standardized test scores, and interacted well with caring teachers and her peers, without the use of a sign language interpreter. However, these are not the primary benefits of the educational experience provided to her by the School District. As an adult, Amy Rowley will have to function in a hearing world. Not only has Amy's

educational program enabled her to achieve academically, it has also provided her with the opportunity to exercise and enhance the skills she will require in order to live as a self-sufficient adult.

In his dissent to the decision of the Court of Appeals, Judge Mansfield stated:

> The language and legislative history of the Act demonstrate that Congress visualized a much more practical objective, i.e., an education for each handicapped child that would enable the child to be as free as reasonably possible from dependency on others, would enable the child to become a productive member of society, and would hopefully promote academic achievement by the child that would roughly approximate that of his or her nonhandicapped classmates. A child's unique needs are met whenever the child's IEP enables the child to meet those goals. See, in accord, Armstrong v. Kline, 476 F.Supp. 583, 604 (ED PA 1979). Judged by this standard, the IEP for Amy clearly complies with the Act without her having a sign language interpreter. Pet. App. A19; 632 F.2d 945, 953.

The decision of the District Court failed to address the unique needs of Amy Rowley, and its decision should be reversed.

4. The Courts below acted in excess of their jurisdiction under the Education for All Handicapped Children Act, and without regard to the administrative procedures contained in the Act.

In sustaining the District Court, the majority of the Court of Appeals disregarded the statutory scheme which recognized the State's primary jurisdiction over education, frustrated the intent of Congress by precluding the Commissioner's review of the placements made beyond the 1978-79 school year, and thus exceeded the court's statutory jurisdiction under the Act.

Under the Act, which creates a federal grant program administered by the states when they choose to participate, the status of each of the more than 200,000 handicapped children in New York is reviewed by the local

educational agency ("L.E.A.") at least once each year. (See also, New York Education Law, §4401(1). Upon completion of the review, which includes review of the progress in the present placement, the child is offered a placement which will meet his special educational needs for the next succeeding school year. If the parents disagree with the placement offered by the L.E.A., they may seek a due process hearing before an Impartial Hearing Officer.

Thereafter, either party may appeal the Hearing Officer's decision to the State Commissioner of Education, who conducts an impartial review of the hearing, and makes an independent decision upon the completion of his review. 20 U.S.C. §1415(c) and (d); New York Education Law, §4404(2) and (3).

It is incumbent upon the State Commissioner to review the placement offered and to determine if it is educationally sound and is in compliance with the State Plan. [13]

In this case, the Commissioner of Education, Gordon Ambach, followed the procedure and determined that Amy was receiving an appropriate education for the school year 1978-79.

Subsequent to the commencement of the action in District Court, but before the Commissioner was made a party defendant, the District and the Respondents stipulated that the

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[13]Not all the states participating in funding under the Act provide for this two-step administrative review. However, New York State has elected a two-step review procedure.

District Court should review the placement for the school year 1979-80, which had not yet begun. Pet. App. D-7; 483 F. Supp. 536, 538, n.1.

The Commissioner objected to the Court's jurisdiction to render a decision with respect to the child's appropriate placement for 1979-80 without the benefit of the prior administrative proceedings required by the Act. The Court held that not only did it have the jurisdiction to determine her 1979-80 educational placement, but also her placement for any year thereafter. Id. at 533. The Court of Appeals affirmed.

The appeal procedure established by Congress under the Act is in conformity with this Court's decisions underscoring the importance of local control of educational matters.

Milliken v. Bradley, 418 U.S. 717 (1974); San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973); Epperson v. Arkansas, 393 U.S. 97 (1968). As this Court has previously recognized, it is the local and state educational agencies, rather than the courts, which possess expertise in the educational field. Congress has adhered to this principle and the statute specifically requires annual review of placement, and an appeal to and decision by the state agency, prior to the commencement of any court action. 20 U.S.C. §1415(e)(2).

Congress intended that the courts, in applying the law set forth in the statute, would be able to review findings made by an agency possessing experience and expertise in the subject

at issue. That Congressional intent has been violated by the Court's acceptance of jurisdiction to decide educational placement issues which have not been the subject of administrative review.

A further exposition of this principle is found in §1415(e)(3) of the Act, as well as in New York Education Law, §4404(4). In that section, Congress clearly and unambiguously directed that during the pendency of any proceedings, including judicial review proceedings conducted pursuant to the Act, the child shall remain in the then current educational placement, unless the state or local educational agency and the parents otherwise agree. The requirement underscores Congress' concern for local control over such matters, and is a

direction to administrative hearing officers and the federal and state judiciary not to disturb the "status quo" until all such procedures have been completed. The courts below have disregarded this principle.

Following the District Court's decision, which changed Amy Rowley's educational placement and directed the provision of a sign language interpreter, the Petitioners filed a timely appeal with the Second Circuit. However, the District Court thereafter issued an Order to Show Cause directing Petitioners to appear and explain why they had not changed the status quo. On the return thereof, Petitioners indicated that an appeal had been filed and was being expeditiously perfected. The Court indicated that punishment for contempt would be directed unless the

Petitioners received a stay from the Court of Appeals.

Although the Court of Appeals subsequently granted a stay, that Court thereafter vacated the stay and directed a change in placement, even though an application for rehearing was pending and the Petitioners had indicated that further review by this Court would be sought.

The Commissioner was thus placed in the untenable position of having to defend his determination and himself in contempt proceedings, under a state of facts he never had an opportunity to review.

Petitioners respectfully contend that it was error for the District Court to determine Amy Rowley's educational placement in subsequent years without regard to the

administrative proceedings mandated under the Act. Ezratty v. Commonwealth of Puerto Rico, 648 F.2d 770 (1st Cir. 1981); Riley v. Ambach, ____F.2d ____, 3 EHLR 552:410 (2nd Cir. 1981); Davis v. Maine-Endwell Central School District, 646 F.2d 560 (2nd Cir. 1980), cert.denied, ____ U.S. ____, 101 S.Ct. 3080 (1981); Doe v. Anrig, 500 F.Supp. 802 (D Mass., 1980).

The Commissioner does not now contend, nor was it his position in the District Court, that once the 1979-80 school year began, the entire matter became moot. Neither does he insist upon an inflexible application of the exhaustion doctrine. However, that doctrine allows the administrative agency to develop a factual record, to apply its expertise to a particular problem, to exercise its discretion and

to correct its own mistakes, all before the court will intervene. The doctrine promotes accurate results in specialized administrative proceedings, not only at the agency level, but also by permitting a more informed judicial review. McKart v. United States, 395 U.S. 185 (1969).

The District Court's determination that the case would evade review if it was referred to an Independent Hearing Officer and the Commissioner for a determination for the 1979-80 school year, is not sustained by facts. See Footnotes 2 and 7 to the Statement of the Case, which set forth the time frame within which this case has been litigated.

Two months elapsed between the Committee's decision on October 4, and the submission of an additional

affidavit to it by the Respondents. After filing their Complaint in the District Court, the Respondents waited almost four months before moving for preliminary relief. The case could have been before the Court in early 1979 if the Respondents had proceeded expeditiously. Their delay should not be allowed to become the predicate for precluding the legally mandated prior administrative review.

The requirement of exhaustion of administrative remedies encourages expeditious decision making, and furthers specific Congressional intent. While there are instances in which the application of the doctrine will not serve those interests, e.g., where the issue may be purely one of law, this case does not represent such an instance. Had the District Court

referred the matter to the Commissioner, it would not have become embroiled in a philosophical and factual dispute concerning the best methods of educating deaf children. It is respectfully submitted that such an issue is a question of educational policy and not within the role of the federal judiciary.

5. Rule 0.23 of the Rules of the Second Circuit Court of Appeals should not have been applied to this case.

§0.23 of the Rules of the Second Circuit provides:

> The demands of an expanding case load require the Court to be ever conscious of the need to utilize judicial time effectively. Accordingly, in those cases in which decision is unanimous and each Judge on the panel believes that no jurisprudential purpose would be served by a written opinion, disposition would be made in open court or by summary order.
>
> Where a decision is rendered from the bench, a court may deliver a brief oral statement, the record of which is available to counsel upon request and payment of transcription charges. Where disposition is by summary order, the court may append a brief written statement to that order. Since these statements do not constitute formal opinions of the court and are unreported and not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court. (Emphasis added.)

The majority of the Court of Appeals has incorrectly invoked the above Rule to limit its holding in this case. In footnote 7 of its decision (Pet. App. A7, 632 F.2d 945, 948), the court stated:

> The majority of the panel of this Court which heard this appeal on May 1, 1980, voted shortly thereafter to affirm the judgment of the District Court and to do so pursuant to a provision of the rules of our court which would preclude citation of our decision at an authority in any other case, thus recognizing what we believe to be the lack of precedential character of our decision in view of the unique facts of this case. We continue to adhere to this view.

The Second Circuit has misapplied the above rule in this case. The decision of the Court was not unanimous, was not rendered from the bench, and was not disposed by a summary order. The facts are not unique. The District Court decided the

case in a manner which the Court of Appeals could not approve, and because it approved the result, it sought to limit the effect of its affirmance by invoking Rule 0.23.

The District Court concluded that every deaf child would fare better in the classroom with an interpreter, and therefore directed that an interpreter be provided to Amy Rowley by the State and local educational agencies. The Court found that each handicapped child should be given the same educational opportunity provided to non-handicapped children.

In order to gauge whether this opportunity was given to Amy Rowley, the Court required the measurement of her educational potential as compared with her actual performance, and a

comparison of the resulting differential or "shortfall" with that of non-handicapped children. Using its test and its method for applying the test it concluded that the Act required the provision of a sign language interpreter for a deaf child even though the unrebutted evidence proved the Respondent was performing above grade level and was proficient in reading. Those interpretations of the Act transcend the unique factual situation of Amy Rowley.

The issue in this case is the interpretation of an important statute applicable to all handicapped children. Although the facts will differ in individual cases, the meaning and interpretation should be uniform, and should not be any different for

Respondent than for any other handicapped pupil.

The undesirable effects of the Rule are highlighted by the facts in this case. The majority of the Circuit Court approved a novel requirement for measuring a school district's obligation to handicapped pupils. If the interpretation and reasoning of the majority of the Circuit Court is correct, it should be applicable to other deaf children. If an interpreter must be required for one child because she is deaf, regardless of need or cost, then why are other deaf children not entitled to the same benefit?

The application of Rule 0.23, even in a case to which it applies by its terms, encourages the Circuit Court to take too narrow a view of the issue.

Legislators and administrators must consider the overall consequences of policy decisions. Rule 0.23 may encourage the Circuit Court to give great weight to the emotional aspects of the case before it, and to adjust its interpretation of the law to its concept of "justice" in a particular case. It may be unpopular or harsh to deny special treatment to handicapped pupils, but "hard cases make bad law" is a sometimes valid maxim, and judicial responsibility requires more than compassion. It also requires restraint. The knowledge that decisions will be widely read and will be cited in similar cases, protects against hasty or illconceived interpretations, and helps assure that appellate review is thorough and legally correct, as well as equitable

in the particular instance. [14]

While Petitioners recognize the need for expeditious determinations to ease a court's heavy case load, the rule does not apply to this case, even by its expressed terms. This Court should disapprove the use of the rule in this situation and should also consider the fact that the majority's specific citation to and reliance on Rule 0.23 indicates some doubt as to their interpretation of the Act.

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[14]For example, where the Court has taken the time to thoroughly consider the issue of exhaustion of administrative remedies, it has reached the opposite conclusion on the issue than did the court in this case (See Davis v. Maine-Endwell, supra, and Riley v. Ambach, supra.)

CONCLUSION

The District Court should have dismissed the Complaint when the School District demonstrated that its program for the education of the Respondent was in conformity with the approved State plan. The definition of free appropriate public education formulated by the District Court was unnecessary, unworkable, and in derogation of the legislative intent. In ordering provision of a sign language interpreter for the Respondent, the District Court failed to consider her outstanding academic achievement, and her unique individual needs, as required by the Act. The Court of Appeals affirmed for the reasons set forth in the District Court's opinion, in disregard of the lack of

administrative review; and improperly invoked Section 0.23 of its rules.

Wherefore, Petitioners respectfully request that this Court reverse the judgment of the Court of Appeals and dismiss the Complaint.

December 15, 1981

Respectfully submitted,

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No. 80-1002

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Petitioners,

-against-

AMY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY in their own right,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

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PETITION FOR CERTIORARI FILED DECEMBER 15, 1980
PETITION FOR CERTIORARI GRANTED NOVEMBER 2, 1981

1979)

QUESTIONS PRESENTED FOR REVIEW

1. Whether, in the case of a particular deaf child who suffers from no mental or emotional disability, a school board has complied with the Education of the Handicapped Act, which requires provision of a free appropriate public education, if the school board fails to provide that child with an educational opportunity equivalent to the educational opportunity provided to nonhandicapped children.

2. Whether, in a case in which administrative remedies have been exhausted for school year 1978-79, a court may grant injunctive relief extending beyond that school year when such relief is found to be appropriate.

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STATEMENT OF THE CASE

Clifford and Nancy Rowley are both deaf. Both are, nevertheless, college graduates and professionals. Clifford Rowley is a research chemist (J.A. 168); Nancy Rowley earned a masters degree in special education and is a certified teacher of the deaf (J.A. 321). They have two children: John, a former student in the Hendrick Hudson Central School District, and Amy, the infant respondent (plaintiff) in this action.

Amy is prelingually deaf.[1] Upon learning of her deafness, Mr. and Mrs.

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[1] Deafness is a severe handicap. 29 U.S.C. 706(12). See also, 121 Congressional Record S 19483, June 18, 1975 (remarks of Sen. Williams). Helen Keller said: "I am just as deaf as I am blind. The problems of deafness are deeper and more complex, if not more important, than those of blindness. Deafness is a much worse misfortune, for it means the loss

Rowley began training Amy in the use of total communication, the mode of communication used in their home, in order to promote her intellectual and emotional well-being despite her deafness (R.A. 24, J.A. 325, App. I).[2] Total communication

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of the most vital stimulus, the sound of the voice that brings language, sets thoughts astir, and keeps us in the intellectual company of man." Helen Keller in Scotland, A Personal Record Written by Herself. London: Methuen and Co. Ltd., 1933, page 68.

A deaf individual is pre-lingually deaf if he or she is born deaf or loses his or her hearing before the age of two. All other deaf individuals are termed post-lingually deaf.

[2] Citations to R., R.A., R.T., R.E., and App. are to the Record, Appendix submitted to the Court of Appeals, Transcript, Exhibits introduced in the District Court and separately compiled for the Court of Appeals, and the Appendix to this brief.

is a flexible system of communication involving a wide range of communication methods, including lipreading, speech development, amplification, sign language, fingerspelling, touching, and visual cues (J.A. 199-203, 309-311). In so proceeding, Mr. and Mrs. Rowley relied upon their personal knowledge and experience in confronting and surmounting the myriad problems of communication and isolation resulting from their deafness and relied too upon Mrs. Rowley's expert knowledge in the education of deaf children. [3]

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[3] Witnesses for both the petitioners and respondents have attested to the superb job Mr. and Mrs. Rowley have done in raising Amy (e.g., J.A. 222, 305-306, R.A. 193). Amy's parents, brother, relatives, and friends use total communication when communicating with her (App. I). Amy relies upon an interpreter in numerous settings, including shows, museums, church, Sunday school, and literary circle meetings (App. I).

The year before Amy was to enter kindergarten, the Rowleys notified the Hendrick Hudson Central School District ("HHCSD") that she would be entering school the following year; they asked HHCSD to place a sign language interpreter in Amy's classroom so that she could use total communication. Initially, HHCSD responded constructively. The principal of Amy's school and several teachers at that school enrolled in a beginner's sign language class to obtain a basic background in sign language.

During Amy's kindergarten year, HHCSD conducted a nine day trial with a sign language interpreter. The sign language interpreter reported that an interpreter was not needed in that specific kindergarten classroom (J.A. 52-56, 122-124).

When Amy began first grade, the Rowleys again asked HHCSD to place a

sign language interpreter in Amy's classroom. The HHCSD Committee on the Handicapped ("COH") rejected the Rowleys' request and all expert evidence they offered on the education of deaf children, terming such evidence "one-sided" (J.A. 320, R.T. 36-54). The COH relied, instead, upon the judgments of people who knew nothing about deafness and who had no experience in the education of deaf children (e.g., J.A. 45, 51) and the results of a hearing test that the COH did not use or understand (R.T. 55-59, Pl. Ex. No. 6, R.T. 55, 75). It provided Amy with services (teacher of the deaf for one hour a day and an FM Wireless hearing aid) that the Rowleys specifically objected to (e.g., J.A. 90, 130, R.T. 24, Plaintiffs' Post-Trial Argument, p. 4, Respondents' brief

to the court of appeals, p. 8.)[4]

The COH recommendation was incorporated into an individualized education program ["IEP"] for Amy drafted by Amy's teachers and the principal of her school. Mr. and Mrs. Rowley were not afforded an opportunity to provide input into the development of that program (J.A. 168-169). Inasmuch as the

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[4] The recommendation of the COH provides that:

1. Amy remain at the Furnace Woods School (her local school);
2. she be provided the services of a certified teacher of the deaf for one hour daily; and
3. she receives the services of a speech therapist three half-hour sessions weekly.

Pet. for Cert., App. F-15-16.

Not until the district court trial did the petitioners assert that the FM Wireless was part of the COH recommendation (R.T. 23), and at that time the respondents objected to that new addition to the COH recommendation (R.T. 24-25).

Rowlwys objected to the failure of Amy's IEP to include provision for a sign language interpreter and the inclusion, instead, of services they objected to, they requested an impartial hearing. [5] The hearing officer rendered an untimely decision affirming the decision of the school district (J.A. 59-64). Thereafter,

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[5] Under the program established by the petitioners, for five out of the six hours of each school day, Amy has an opportunity to understand no more than 59 percent of linguistic information. Only during the one hour a day when she is taught by a teacher of the deaf who uses total communication does she have an opportunity to understand 100 percent of linguistic information (J.A. 206). Indeed, under that program, Amy did not even know that she was still in school (R.T. 74-75).

Amy cannot process "linguistic information through hearing alone, with or without amplification." 34 CFR 300.5 (b)(1). The FM Wireless is a hearing aid; it is not a discrete sound amplification device. There is no such thing as a discrete sound amplification device. Like all hearing aids, it amplifies all sounds. Amy wears her own hearing aids,

the Rowleys petitioned the New York State Commissioner of Education to review the decision of the hearing officer. Following the Commissioners' untimely dismissal of their petition, the Rowley's initiated suit against HHCSD in Federal district court on April 24, 1979. The United States marshall served their summons and complaint on the school district on May 21, 1979. By order dated August 22, 1979, the District Court denied the petitioners' motions to dismiss and ordered the Commissioner of Education joined as a party defendant. (J.A. 163-164). Issue was joined on or after September 26, 1979.

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which were found to be the best hearing aids for her after extensive testing at the Thornberry Clinic, Gallaudet College, and the Speech and Hearing Clinic, West-Chester County Medical Center. Each day

The testimony in the district court and the administrative records received by the court (R.T. 225-228) showed that Amy is severely deaf. Under ideal conditions, relying upon lipreading and amplification only, she understands a maximum of 58-59 percent of oral communications (J.A. 184, R.E. 10). Those percentages were obtained in tests administered by Dr. Ann Barbara Kligerman, the Director of the Speech and Hearing Clinic at the Westchester County Medical Center, whose diction, as Judge Broderick saw, is perfect. If a communication is not a one-to-one conversation with a person who speaks very clearly and whose speech

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the school requires Amy to remove her own hearing aids and replace them with the FM Wireless. Amy's own hearing aids are superior to the FM Wireless (R.T. 115); she makes optimal use of those aids (R.T. 134).

pattern she is familiar with, in a familiar context, in perfect lighting (such as in the testing room in which she was tested), without any background noise (the testing room is sound-proofed), Amy's level of comprehension falls below 58-59 percent (J.A. 187-190). Thus, Amy comprehends no more than 50 percent of communications without the use of total communication (App. I); does not understand what is said in her classroom (J.A. 93-94); cannot follow her reading group (R.T. 75); fails to comprehend a great deal in discussions with her teachers (R.T. 76); misses communications from her teacher in their entirety when the teacher has her back to the class (J.A. 95, 107); misses comments made by other than the primary speaker in small

group discussions (J.A. 105); fails to comprehend communications in large or small groups when the speaker speaks rapidly (J.A. 107); understands little during special assemblies, movies, and field trips because of distance from the speaker, lighting, and other environmental factors (J. A. 107-108); misses oral directions (J.A. 114); and talks, but does not "listen" during group discussions (R.A. 175).

With the use of total communication, Amy has access to 100 percent of oral communications (J.A. 185, R.E. 10).

Amy's hearing is good in the very low frequencies, below the frequencies of human speech. She may be able to hear a dog bark or a car backfire and recognize it as

such. However, when you enter the range of frequencies of human speech, her hearing falls off precipitously, and eventually vanishes (J.A. 174-175). Amy cannot distinguish vowel sounds (R.E. 55-56). [6]

Mrs. Rowley works with Amy on her schoolwork on a daily basis (J. A. 167). Also, Amy receives substantial supportive assistance from her father, her brother, and other relatives (App. I).

Amy is a bright (R.A. 193), highly motivated (R.A. 173), eager, inquisitive (R.A. 189), special (J.A. 222, 306) child. Amy attained

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[6] That Amy can detect sound behind her is not much of a phenomenon. Dr. Kligerman testified that Amy can detect sound behind her (J.A. 175-176), although she cannot decipher that sound. Indeed, if Dr. Mulholland's testimony is to be believed, that a person who has no hearing at all is not deaf but merely masquerades as a deaf person (R.T. 381), then there does not exist a deaf person anywhere who is unable to detect sounds behind him.

above average scores on standardized achievement tests (R.E. 23-54).[7] The District Court attributed that performance to Amy's "superior intellectual and personal abilities" (Pet. for Cert., App. C-16, 483 F. Supp. 528, 536) and the "efforts . . . of her parents" (Pet. for Cert., App. C-14, 483 F. Supp. 528, 535).

The District Court determined that each handicapped child was entitled to an opportunity to understand oral communications in the classroom and that, therefore, the school district had to place a sign language interpreter in Amy's classroom "in order to bring her educational opportunity up to the level of the

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[7] Amy's highest score, for listening comprehension (R.E. 36), was attained when the material was presented to her using total communication (J.A. 249-250).

educational opportunity being offered to her non-handicapped peers." (Pet. for Cert., App. C-16, 483 F. Supp. 528, 535). [8] His independent decision, based upon the preponderance of the evidence, followed his considerations and assimilation of the administrative records and

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[8] Amy has had an interpreter since October 1980. Prior to that time, her interaction with her classmates was no more than superficial. See Pet. for Cert., App. C 19-20, note 5, 483 F. Supp. 528, 531, note 5. Now, other children are learning sign language so that they can communicate with Amy. Although Amy is deaf, she is a member of the Glee Club and has started learning to play the trumpet. In short, for the first time since she entered school, she is a real member of her class. See J.A. 203-204.

As a necessary concommitant of that order, Judge Broderick directed the petitioners to include provision for a sign language interpreter in Amy's IEP. the petitioners still have refused to comply with that directive.

additional evidence offered by both parties [9] and the credibility of the parties and witnesses. [10]

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[9] Mr. and Mrs. Rowley, Dr. Sternberg, and Mr. Denis are deaf and testified using total communication, which, per force, is visual in nature.

[10] For example, two days before the commencement of the trial, the petitioner Commissioner dispatched two of his employees (Dr. Norman Doctor and Mr. Edmund Cortez) to observe Amy for twenty minutes and then confirm his predetermined position (J.A. 235-236).

On the afternoon of September 28, 1979, the attorney for the Rowleys began examining Mr. Cortez on his certification (J.A. 244-245), knowing at that time that he was not certified as a teacher of the deaf by the New York Department of Education. Before he could answer, the trial was recessed until the following Thursday, October 4, 1979. At that time, Mr. Cortez testified that he had New York certification, having obtained it "just this past week." (J.A. 247-248).

clearly erroneous, but are adequately supported by the evidence . . . Moreover, the court weighed and evaluated the evidence with great care. In affirming the judgment of the district court, we are satisfied that the court meticulously applied precisely the standard prescribed by Congress." (Pet. for Cert., App. A-5, 7, 632 F.2d 945, 947, 948).

SUMMARY OF ARGUMENT

As a condition for the receipt of Federal funds under the Education of the Handicapped Act, New York State committed itself to providing each handicapped child within its borders with a free appropriate public education.

For purposes of this litigation, a free appropriate public education is an education that provides Amy Rowley with an equal educational opportunity, i.e., the same opportunity to benefit from whatever it is the Hendrick Hudson Central School District has to offer to every child enrolled therein, despite her deafness. It is an input standard; the school district is not required to guarantee her any particular level of achievement, only an opportunity to

achieve equivalent to the opportunity provided to other children. The school district is not required to provide Amy with any educational services, unrelated to compensation for her deafness, that are not provided to other children. For example, the school district is not obligated to offer her a course in algebra if such a course is not offered to other children.

New York agreed to establish procedural safeguards, as set forth in the Education of the Handicapped Act, to protect the rights of handicapped children and their parents, which safeguards culminate in judicial review of all matters related to the provision of a free appropriate public education to a handicapped child.

A determination of Amy's unique needs resulting from her deafness that must be taken into consideration in order to provide her with a free appropriate public education must be made on an individual basis. That determination involves consideration of such matters as her upbringing and her level of comprehension of oral communications. The District Court conducted a fact-finding hearing to determine the related service necessitated by Amy's unique needs resulting from her deafness. On the other hand, the petitioners provided Amy with the services they assumed to be the minimum they had to provide to any deaf child; services which both lower courts found to be inappropriate.

Cost to the Hendrick Hudson Central School District is not an issue in this

litigation, inasmuch as it was not raised below. The sole issue before this Court is this: Despite her deafness, is Amy entitled to the same opportunity as other children to make a success out of her life? The respondents say yes; the petitioners say no.

POINT I

A FREE APPROPRIATE EDUCATION IS AN EDUCATION THAT PROVIDES A HANDICAPPED CHILD WITH AN EDUCATIONAL OPPORTUNITY EQUIVALENT TO THE EDUCATIONAL OPPORTUNITY PROVIDED TO NON-HANDICAPPED CHILDREN.

A. Each recipient state must provide each handicapped child with a free appropriate public education.

As a condition for the receipt of funds under the Education of the Handicapped Act ("Act"), a state is required to provide each handicapped child within its borders with a free appropriate public education. ("FAPE"). 20 U.S.C. 1412(1) and (2)(B), 1413, 1414(a)(6). E.g., S. Rep. No. 94-168, pp. 3, 6, 8, and 16, reprinted in U.S. Code Congressional and Administrative News, 1975, pp. 1425, 1427, 1430, 1432, and 1440; H. Rep. No. 94-332, pp. 6, 16, and 29; S. Conf. Rep. No. 94-455, pp. 36-38, reprinted

in Cong. & Adm. News, 1975, pp. 1480, 1489-1491; S. Rep. No. 95-125, p. 3; H. Rep. No. 95-268, p. 4 (to accompany Public Law 95-49). [11] For recipients of funds under the Act, between November 29, 1975, the date of enactment of Public Law 94-142, the Education for all Handicapped Children Act of 1975 ("1975 Act"), and September 1, 1978, States were to plan how to establish and begin to implement a FAPE. After September 1, 1978, a FAPE "will be available" to each handicapped child. 20 U.S.C. 1412(2)(B).

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[11] The petitioners contend that recipient states do not agree to provide an appropriate education to handicapped children (brief, pp. 33, 34). That is a novel theory, not only not raised below, but diametrically opposed to the petitioners' argument below (e.g. J.A. 332; Commissioner's brief to the court of appeals, pp. 8, 17; HHCSD trial memorandum, p. 14). The petitioners have known all along the conditions for receipt of Federal monies under the Act.

Court action and State laws throughout the Nation have made clear that the right to education of handicapped children is a present right, one which is to be implemented immediately. The Committee believes that these State laws and court orders must be implemented and that the Congress of the United States has a responsibility to assure equal protection of the laws and thus to take action to assure that handicapped children throughout the United States have available to them appropriate educational services. The Committee believes that the provisions it has adopted in S. 6 reinforce this right to education, while still providing States and local educational agencies ample time to fulfill the full service goal.

S. Rep. No. 94-168, pp. 17-18, reprinted in Cong. & Adm. News, 1975, p. 1425, 1441.

. . . Though the truism that "justice knows no timetable" cannot be argued with, it is generally agreed that there should be a date beyond which no State or locality may be failing without penalty to guarantee the basic rights of handicapped children, and most especially, a guarantee against outright exclusion. Also, it is felt that the States ought to be given a reasonable -- but not lengthy -- time period in which to reach "full service." H.R. 7217 establishes a "date certain" of September [1], 1978.

H. Rep. No. 94-332, p. 15.

See also, 121 Congressional Record H 37024, November 18, 1975 (remarks of Rep. Brademas); 121 Congressional Record S 37413, November 19, 1975 (remarks of Sen. Williams).

Participation in this Federal-state grant program is voluntary. ". . . States are given the choice of complying with the conditions set forth in the Act or foregoing the benefits of federal funding." Pennhurst State School & Hospital v. Halderman, U.S. , 101 S. Ct. 1531, 1536 (1981). See also, King v. Smith, 392 U.S. 309, 88 S. Ct. 2128 (1968); Lau v. Nichols, 414 U.S. 563, 94 S. Ct. 786 (1974). In the latter case, a school district was ordered to provide non-English-speaking children with educational services to overcome their language disabilities. "Whatever may be the limits of that power [to fix the terms on which Federal money allotments to the states will be disbursed], they have not been reached here." Id. at 569. In Lau

this Court dealt with administrative regulations. This case is much stronger, inasmuch as Congress specifically laid down the conditions for receipt of Federal moneys.

As noted (note 15, infra, and accompanying text), the New York State Constitution assures that each handicapped child will be provided with a free public education, including the services necessary for that education to be meaningful to the child. The Act establishes requirements as conditions for receipt of Federal monies that are 99 percent to 101 percent of the requirements imposed on the petitioners under the New York State Constitution. If New York State did not participate in the Federal program, the State and its political

subdivisions would have to fulfill obligations under the New York State Constitution that are virtually identical to the conditions established by the Act -- but without the assistance of the Federal monies.

B. A free appropriate public education is an education that provides a handicapped child with an equal educational opportunity.

The Act, as amended by the 1975 Act, defines FAPE. 20 U.S.C. 1401(18). [12] However, that is not a functional definition and, thus, it offers judges no guidance in their consideration of controversies involving "the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education." 20 U.S.C. 1415(b)(1)(E). See Battle v. Pennsylvania, 629 F. 2d 269, 276, 279, 284 (concurring and dissenting) (Third Department, 1980); cert. denied sub nom., Scanlon v. Battle,

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[12] Reference to the IEP indicates Congress' intention that the term FAPE be particularlized for each handicapped child.

U.S. , 101 S. Ct. 3123 (June 22, 1981); Springdale School District v. Grace, 656 F.2d 300, 304 (Eighth Circuit, 1981). [13]

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[13] At the trial, the petitioners argued that the term FAPE ". . . as used in this statute [the Act] has not yet been construed by the Courts . . ." Trial memorandum of petitioner school district, page 16. The petitioners thereupon offered material to assist Judge Broderick in formulating a standard for FAPE. The standard formulated by Judge Broderick is the standard sought by the petitioners; their objection is not to the standard, but to its application to the facts herein. See Pet. for Cert., App. A-5, note 4, 632 F. 2d 945, 947.

The petitioners object to Judge Broderick's reference to the Regulations promulgated under section 504. While those Regulations are clearly relevant to the case herein, where, as here (id. at p. 18), a party relies upon a statute in a lower court, he may not later object to its application. See Hurley v. Commissioner of Fisheries, 257 U.S. 223, 225, 42 S. Ct. 83 (1921).

Even assuming, arguendo, that the definition in the Act provides a usable definition of FAPE, it is an accepted rule of construction that: "When aid to construction of the meaning of words, as used in a statute, is available, there certainly is no 'rule of law' which forbids its use however clear the words may appear on 'superficial examination.'" United States v. American Trucking Associations, 310 U.S. 534, 543-544, 60 S. Ct. 1059 (1940).

A good starting point is the definition of the word "appropriate." Webster defines "appropriate" as "specially suitable." [14]

The standard enunciated by Judge Broderick is bottomed in equal educational opportunity (". . . a standard . . . more in keeping . . . with the Equal Protection decisions which motivated the passage of the Act." Pet. for Cert., App. C-11; 583 F. Supp. 528, 534). The ruling of this Court in Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686 (1954), to the effect that a State that undertakes to provide an opportunity to obtain an education to children within its borders must provide that opportunity to all on

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[14] The petitioners argue, nevertheless, that they are only required to provide Amy with an "adequate" education (Pet. for Cert., Reply Brief, page 16). Adequate means barely satisfactory; it is neither synonymous with nor even

equal terms served as the legal underpinning of the 1975 Act. [15] Sen. Report No. 94-168, page 6, reprinted in Cong. and Adm. News, 1975, page 1425, 1430; 121 Congressional Record S 19485, June 18, 1975 (remarks of Sen. Williams); Stafford, The Education for All Handicapped Children Act of 1975, a Senator's Perspective, 3 Vermont Law Review, 71 (1978). At the time of passage of the 1975 Act, several

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close to being a synonym for appropriate. Absent a clear showing that Congress misspoke itself, the irrebutable presumption must be that Congress meant what it said.

[15] The New York Court of Appeals has held that Article 11, Section 1 of the New York State Constitution, wherein New York has undertaken to provide all children with the opportunity to a public education, assures that each handicapped child will be provided with a free public education, including the services necessary for that education to be meaningful to the child. Matter of Levy, 38 N.Y.2d 653, 657-58, 382 N.Y.S.2d 13 (1976). See also, New York Education Law, section 3201 et seq.; section 4401 et seq.

dozen Federal and State courts had determined, based upon the Brown ruling, that handicapped children are entitled to an equal educational opportunity. S. Rep. No. 94-168, pp. 5-6, 7, 22-23, reprinted in Cong. & Adm. News, 1975, pp. 1425, 1429-30, 1431, 1447-48; H. Rep. No. 94-332, pp. 3-4, 10; 121 Congressional Record S 19482, June 18, 1975 (remarks of Sen. Randolph), id. at 19485 (remarks of Sen. Williams), id. at 19503 (remarks of Sen. Cranston), id. at 19504 (remarks of Sen. Schweiker); 121 Congressional Record H 23703, 704, July 21, 1975 (remarks of Rep. Brademas), id. at 23706 (remarks of Rep. Quie); 121 Congressional Record H 37029, November 18, 1975 (remarks of Rep. Michel); 121 Congressional Record S 37411, November 19,

1975 (remarks of Sen. Stafford).[16]

By passage of the 1975 Act, Congress sought to fulfill its Constitutional mandate that all individuals, regardless of disability, be accorded equal protection of the laws. See 20 U.S.C. 1400 (b)(3 and 9); S. Rep. No. 94-168, pp. 9, 13, 17, reprinted in Cong. & Adm. News, 1975, pp. 1425, 1433, 1437, 1441; S. Conf. Rep. No. 94-455, pp. 28-29, reprinted in Cong. and Adm. News, 1975, pp. 1480, 1481-82; 121 Congressional Record S 19492, June 18, 1975 (remarks of Sen. Williams), id. at

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[16] The Act speaks of the provision of "full educational opportunity" to handicapped children. 20 U.S.C. 1412 (2)(A)(i) and 1414(a)(1)(C). See 121 Congressional Record S 19482, June 18, 1975 (remarks of Sen. Randolph); 121 Congressional Record H 23703, July 21, 1975 (remarks of Rep. Brademas); 121 Congressional Record H 37027, November 18, 1975 (remarks of Rep. Gude); 121 Congressional Record S 36418, November 19, 1975 (remarks of Sen. Biden).

19504 (remarks of Sen. Schweiker). [17]

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[17] At pages 64-65 of their brief, the petitioners set forth four excerpts from the Congressional debates preceding passage of the 1975 Act. The full statement of Senator Stafford shows that enactment of the 1975 Act "will finally bring to all the handicapped children of our Nation what has always been their right -- a free appropriate public education." 121 Congressional Record S 19482, June 18, 1975 (emphasis added). Senator Williams stated that "The time, I hope, has come when we look no longer upon persons with disabilities as charitable objects, unable to make significant contributions. Action on this legislation will establish a public policy that will break the chain of ignorance once and for all." Id. at 19492. Senator Randolph asserted that: "The Education for All Handicapped Children Act of 1975 promises handicapped children the educational opportunity that has long been considered the right of every other American child." 121 Congressional Record S 37410, November 19, 1975. Representative Harkin (who may be the only Congressman who can sign fluently) stated that a FAPE is a right of every handicapped child, not just children who are mentally retarded. The statement shows that he is especially interested in the educations provided to children who are deaf, because his brother is deaf. His strong support of the 1975 Act resulted from his desire to see that deaf children receive proper educations that take into account the unique needs resulting from their disabilities. 121 Congressional Record H 25541, July 29, 1975.

Insofar as this litigation is concerned, the goal of the Act is to provide each handicapped child with an equal educational opportunity. E.g. S. Rep. 94-168, p. 9, reprinted in Cong. and Adm. News, 1975, p. 1425, 1433; H. Rep. No. 94-332, p. 4; 121 Congressional Record S 19483, June 18, 1975 (remarks of Sen. Stafford), id. at 19505 (remarks of Sen. Beall); 121 Congressional Record H 23704, July 21, 1975 (remarks of Rep. Brademas), id. at 23706 (remarks of Rep. Quie); 121 Congressional Record H 37030, 31, November 18, 1975 (remarks of Rep. Mink); 121 Congressional Record S 37412, November 19, 1975 (remarks of Sen. Taft), id. at 37418, 19 (remarks of Sen. Cranston).

The petitioners concede that the goal of the Act is to provide handicapped children with equal educational oppor-

tunities. (E.g., J.A. 346, 350-351; petitioner HHCSD post trial brief, p. 24). They argue, however, that that goal has no relevance to the definition of the term FAPE (Pet. for Cert., reply brief, p. 3) and that, therefore, that conceded goal can somehow be attained by providing handicapped children with an education that does not measure up to the education provided to other children. As noted by Judge Newcomer, the definition of FAPE can only be determined by reference to the goals envisioned by Congress. Armstrong v. Kline, 476 F. Supp. 583, 603 (EDPa, 1979). ". . . [T]he goal is the main thing. There can be no wisdom in the choice of a path unless we know where it will lead." Cardozo, The Nature of the Judicial Process, page 102. See also,

Battle v. Pennsylvania, 629 F.2d 269, 284 (concurring and dissenting opinion of Judge Sloviter) (Third Circuit, 1980); cert. denied, sub nom. Scanlon v. Battle, June 22, 1981. [18]

In light of the fact that Judge Broderick's standard had been solicited by the petitioners (see note 13, supra) and in light of their acknowledgment that the goal of the Act is to provide handicapped children with equal educational opportunities, not unsurprisingly, the petitioners do not argue that the standard is wrong; instead, they argue that it is unworkable (J.A. 354). The respondents cannot imagine how or why; certainly, in Amy's case, a simpler standard to apply cannot be imagined. One must first start with two incontestable presumptions: (1) material presented in the classroom

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[18] The petitioners seemingly contradict themselves. E.g. Brief, p. 57; Pet. for Cert., p. 18.

is relevant to the educational process; and (2) absent a hearing impariment, each child has an opportunity to understand 100 percent of what is presented. The deficiency in Amy's education is established by showing that she has an opportunity to decode less than 100 percent of the material presented orally because of her deafness.[19] That is not

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[19] By definition, equal is a word of comparison. To illustrate, Amy must be compared with a hypothetical student, possessed of all her intellectual and other qualities, but possessed of hearing necessary to provide him with the opportunity to understand 100 percent of communications.

I - Intelligence.
E - Energy.
N - Initiative.
A - Intellectual assertiveness.
C - Opportunity to comprehend oral communications.

Hypothetical Student		Amy Rowley
I x E x N x A x C	=	I x E x N x A x C-41

The I, E, N, and A cancel each other out. To make the equation equal, and provide the students with equal educational opportunities, either

30 years ago. [20]

Even assuming, arguendo, that the petitioners are correct and the standard for FAPE envisioned by Congress is unworkable, it is their place to go back to Congress to have that standard revised. The judicial branch of government interprets laws, it does not write them. Diamond v. Chakrabarty, 447 U.S. 303, 100 S. Ct. 2204, 2210-2211 (1980); United States v. Rutherford, 442 U.S. 554, 99 S. Ct. 2470, 2477 (1979); Tennessee Valley Authority v. Hill, 437 U.S. 153, 189-193, 98 S. Ct. 2279 (1978). [21]

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[20] Defective hearing in children tends "to prevent them from receiving the full benefit of school work." New York Education Law, section 904.

[21] During 1981, Congress had been asked to repeal the Act and include the education of the handicapped program within an omnibus educational block grant program (S. 1103, H.R. 3645); it declined to do so. Congress had been asked to reduce authorizations under the Act; it increased those authorizations (Public Law 97-35). Congress had been asked to reduce appropriations under the Act; it increased those appropriations (Public Law 97-92).

a radical idea; the New York State Legislature recognized precisely that more than

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Amy's access to oral communications must be increased by 41 percent or the hypothetical student's comprehension of oral communications must be decreased by 41 percent.

In Amy's case, the 41 percent shortfall in the ability to comprehend oral communications is proven administering to her a test to determine how much she misses because of her deafness. Amy was administered by the Utley Lipreading Test. (J.A. 184; Pl. Ex. No. 12, R.T. 109, R.E. 9-10; Pet. for Cert., App. C-7-8, reprinted 483 F. Supp. 528, 532). Dr. Mulholland, the petitioners' witness, confirmed that the Utley test is an "excellent test and has good validation, good reliability . . ." (R.T. 384-385).

As shown above, there is no need to evaluate the potential of any, let alone every, child in a school district. The petitioners have created a straw man in their assertions that Judge Broderick's Opinion requires them to evaluate the potential of every child. However, it should be noted that Judge Broderick did not formulate the concept of potential post-trial (Pet. for Cert., Reply Brief, page 7). At the trial, Judge Broderick asked Dr. Mulholland: "Has there been any test developed . . . which has the purpose of indicating the potential that a deaf child may have?" R.T. 383. Dr. Mulholland proceded to answer that precise question over the next seven pages of the Transcript.

Equal educational opportunity is an input standard. The school need only provide a handicapped child with the services needed to respond to the unique needs occasioned by his disability in order to provide that child with the same opportunity as other children to benefit from whatever it is the school has to offer. See Haggerty and Sacks, Education of the Handicapped, Towards a Definition of Appropriate Education, 50 Temple Law Quarterly, 961, 972-973 (1977). The Act envisions no specific end result (the school is not held accountable for the achievement of the maximum potential of the handicapped child, nor could any reasonable reading of Judge Broderick's

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The petitioners are asking this Court to do precisely what Congress refused to do: convert this categorical program into a block grant program.

Opinion lead to that conclusion). Judge Broderick's standard is an input standard, derived from the respondents' (plaintiffs') post-trial reply brief, pp. 5-6. That his standard has been so interpreted is made clear by this excerpt:

> The nonhandicapped child in the Springdale elementary system is provided the opportunity to learn language skills, reading, writing, arithmetic, social studies and science. The school provides the nonhandicapped child an opportunity to learn the basics and to learn them well enough that he might excel in his secondary school courses. But the Springdale school does not turn every one of its students into academicians or professionals, or even successful secondary school students. The home life of the child, his parents' interests and the child's cultural and sociological environment often determine the child's academic success and attainment or lack of such.

Springdale School District v. Grace, 494 F. Supp. 266, 272 (WDArk, 1980); aff'd. 656 F.2d 300, (Eighth Circuit, 1981). See, also, Espino v. Besteiro, 520 F. Supp. 905 (SDTex, 1981); Bales v. Clark, 523 F. Supp. 1366, 1370 (EDVa., 1981).

That the petitioners are fully aware of that is evidenced by this excerpt from the oral argument before the court of appeals:

> JUDGE BONSAL: The potential of unhandicapped children is completely different, too, isn't it? I mean it seems to me what you are talking about here is giving the handicapped child no further -- I don't know whether potential comes into it -- but the handicapped child should have equal opportunity with unhandicapped children to receive whatever it is the school can offer.
>
> MR. SHERMAN: I think that is true. There is no requirement that nonhandicapped children be provided an education that will maximize their potential.
>
> JUDGE BONSAL: No. I think that is it. If they got the equal opportunity, then from there on it is up to them.

J.A. 350-351.

It may be that "equal educational opportunity" means providing identical services and equipment to all children,

irrespective of disability. [22] But that would amount to a specific repudiation

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[22] This Court has found that equal educational opportunity is not shown "even though the physical facilities and other 'tangible' factors may be equal . . ." Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686 (1954).

In Lau v. Nichols, 483 F. 2d 791, 806 (Ninth Circuit, 1973), Judge Hufstedler (dissenting) declared that "equal treatment of unequals" does not satisfy the demands of equal protection. This Court, in reversing the Ninth Circuit and adopting Judge Hufstedler's dissenting views, declared: ". . . there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." Lau v. Nichols, 414 U.S. 563, 566, 94 S. Ct. 786 (1974).

of Congress' directive that special education and related services provide for the "unique needs" [23] of handicapped children. 20 U.S.C. 1401 (17 and 18). The fact that the petitioners have provided Amy with services, no matter how ineffective, shows that even they do not interpret "equal educational opportunity" in that manner (J.A. 332-333).[24]

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[23] Amy's unique needs are obvious; she needs to have oral communications presented to her other than orally. Because of deficiencies in her comprehension of oral communications, Amy has significantly less chance to succeed as a student than a similarly situated student who is not deaf -- unless she is provided with the opportunity to understand the same oral communications presented to that similarly situate student. That is just common sense; you build on a child's strengths, not on a child's weaknesses.

[24] The petitioners appear to have abandoned their contention that the Act does not include provision for the use of sign language interpreters, nevertheless, it should be noted that the Act includes the use of reader services and braille texts, 121 Congressional Record H 23707, July 21, 1975 (remarks of Rep. Quie),

Citing the decision in Pennsylvania Association for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (EDPa, 1971) and 343 F. Supp. 279 (1972), the petitioners and their amicus appear to suggest that the purpose of the Act is to place handicapped children who are not receiving any education into the public schools so they can take up space. That decision does not, in any way, stand for that proposition. Furthermore, that is not education -- education is providing children with effective programs. Dr. Edward W. Martin, Director of the Office of Education of the Handicapped, Department of Health, Education, and Welfare. Hearings Before the Senate Committee on Labor and Public Welfare, June 17

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although nowhere is that stated explicitly in the Act or the regulations promulgated thereunder.

and 24, 1974, p. 1786. Dr. Martin's views were echoed by all individuals who addressed the subject in testimony before the Senate Committee. Clearly, the Act is intended to assist handicapped children who are receiving an inappropriate education. 20 U.S.C. 1400(3), 1412(2)(C).

The petitioners urge that the goal of the Act is to develop a handicapped child's self-sufficiency.[25] That may very well be, but it has nothing to do with this controversy. As heretofore noted, note 12, supra, the Act envisions different goals for different children. Self-sufficiency very likely is the educational goal for children who suffer from mental

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[25] By so arguing, the petitioners acknowledge that the definition in the Act is not a usable one.

or emotional disabilities. Self-sufficiency could not be the goal for Amy; if she never set foot in school, she would be self-sufficient when she grew up. As the term "self-sufficient" is defined and commonly understood, she could, without any contribution from the HHCSD, wash, feed herself, go to the bathroom, etc. Presumably, that is true of every child who suffers from a physical, rather than a mental or emotional, disability. [26] If self-sufficiency is the only goal envisioned by the Act for every handicapped child, then the Act is a

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[26] Of course, there are situations where a child with a physical disability will not be able to perform one or more of those manual operations because of the limitations imposed on him by that disability (e.g., a child with spina bifuda cannot go to the bathroom).

nullity for more than half of the children the Act itself defines as coming under its umbrella. 20 U.S.C. 1401 (1). Courts shall not interpret Congressional statutory language in such a manner as to render it meaningless and ineffective. United States v. Menasche, 348 U.S. 528, 538-539, 75 S. Ct. 513 (1955); Bird v. United States, 187 U.S. 118, 124, 23 S. Ct. 42 (1902); Federal Trade Commission v. Retail Credit Co., 515 F. 2d 988, 994-995 (D.C. Circuit, 1975).

In her concurring and dissenting opinion in Battle v. Pennsylvania, 629 F. 2d 269 (Third Circuit, 1980), Judge Sloviter states precisely that: "This goal [self-sufficiency] . . . appears to be the generally accepted educational objective for severely retarded and emotionally disturbed

children." (page 285). The majority in that opinion noted: "We think it would be unwise to declare in advance that all educational policies predicated on other reasonably conceived goals are invalid. Each such policy deserves the benefit of a full examination for compliance with the Act by this court, especially in light of a legislative history which we do not believe clearly defines any single ultimate goal." Id. at 279, note 11. In Armstrong v. Kline, 476 F. Supp. 583 (EDPa, 1979): "By enunciating this standard [self-sufficiency], the Court does not mean to imply that it is the only one that is used to evaluate whether a program is 'appropriate' and meets the 'unique needs' of the handicapped child. Of course, Congress may have had other goals that it wished

the educational program to satisfy (including allowing the handicap (sic) child access to the programs available to non-handicapped students) . . ." (Page 604, note 8). [27]

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27 "Handicapped individuals have a normal probability of being creative and talented." Sen. Rep. No. 94-168, p. 12, reprinted in Cong. and Adm. News, 1975, p. 1425, 1436. The purpose of the Act is to provide handicapped children with the educations that will offer them the opportunity to live "meaningful lives." Id. at p. 9. There are deaf individuals who are chemists (Mr. Rowley, for example), engineers, microbiologists, lawyers, doctors, etc. Indeed, the only position that a properly educated deaf individual could not qualify for would be that of telephone operator.

Senator Javits stated that: "[H]andicapped youth have minds and ambitions, too. One of them became President of the United States and remained President for an unprecedented four terms. There have been other highly significant examples, although we do not need any better example than that of F.D.R., Sr., as to overcoming a handicap." Later, Senator Javits spoke of Thomas Edison (who was deaf) as well. 121 Congressional Record S 19494, June 18, 1975 and S 37416, November 19, 1975. Certainly, Franklin Roosevelt and Thomas Edison did something more than attain self-sufficiency.

Relying upon 20 U.S.C. 1401(18)(B), the petitioners argue that each State shall define the term FAPE. That is still another novel theory, totally at odds with the petition for certiorari,

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Senator Beall spoke of the contributions handicapped children can make to society (id. at 19505).

Representative Biaggi stated that failure to provide handicapped children with FAPEs will waste the "talents" of those children. "Every child has a right, regardless of handicap, to realize his fullest potential, no matter how great or how small." 121 Congressional Record H 23709, July 21, 1975.

"The time has come to reject the false notion that persons with disabilities are sole cases for charitable action. This legislation will assure that all handicapped persons are granted the opportunity to make the valuable and significant contributions of which they are capable, to our society." (id. at 23709) (remarks of Rep. Minish).

pages 19-20. [28] If the ultimate determination of the meaning of FAPE is left to the entities whose failures (20 U.S.C. 1400 (b)(2-6)) were the reason for enactment of the 1975 Act, then we fan expect more of the complacent nonperformance of the past. The provision cited by the petitioners stands for the proposition that the States shall have authority to implement, not define, the provision of a FAPE. See Battle v. Pennsylvania,

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[28] "The fact that this asserted basis of liability is so obviously an afterthought may be some indication of its merit, but since it was neither pleaded, argued, nor briefed either in the District Court or the Court of Appeals, we will not consider it." Miree v. DeKalb County Georgia, 433 U.S. 25, 33-34, 97 S. Ct. 2490 (1977). See also, Duignan v. United States, 274 U.S. 195, 200, 47 S. Ct. 566 (1927); United States v. Lovasco, 431 U.S. 783, 788 note 1, 97 S. Ct. 2044 (1977); Lawn v. United States, 355 U.S. 339, 362, note 16, 78 S. Ct. 311 (1958).

629 F. 2d 269, 284 (Third Circuit, 1980) (Judge Sloviter, concurring and dissenting); cert. denied sub. nom., Scanlon v. Battle, U.S. , 101 S. Ct. 3123 (June 22, 198).[29]

C. A Federal judge may grant all appropriate relief in order to provide a handicapped child with a FAPE.

The petitioners argue that handicapped children to not have a right to a FAPE. That is yet another new theory, not raised in the courts below.

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[29] Judge Broderick's order does not require the petitioners to hire an interpreter; it requires the petitioners to place an interpreter in Amy's classroom to interpret for her. Implementation of that order is left to the petitioners (J.A. 384-386).

State standards cover such diverse matters as discipline; certification of teachers; size of classes; and the prerequisites for the granting of diplomas.

> For purposes of appellate review, "may [an appellant] now completely change his theory upon review and so seek in this court a reversal on the ground that admiralty law controlled adjudication. . . 'The theory upon which the case was submitted and argued in the district court cannot, when an adverse judgment results, be discarded and a new, contradictory theory be substituted and successfully invoked on appeal'". Holm v. American Shipbuilding Company, 275 F. 2d 201, 202-203 (Sixth Circuit, 1969).

The Act requires each State wishing to participate in the program to enact legislation to assure that each handicapped child within that State will have a right to a FAPE, as defined in the 1975 Act. 20 U.S.C. 1412(1); S. Rep. No. 94-168, p. 10, reprinted in Cong. and Adm. News, 1975, p. 1425; Helping Children With Handicapping Conditions in New York State, p. 20. It suffices to note that the New York State Plan provides that: "All

school-age children have an absolute right to a free, appropriate education." id. at 237. [30]

The petitioners concede that the New York State Plan, drafted pursuant to 20 U.S.C. 1413, and the Regulations of the Commissioner of Education of the State of New York are broad enough to encompass the provision of a sign language interpreter for a deaf child.[31] They argue, however, that the only

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[30] See also, Your Child's Right to an Education, A Guide for Parents of Handicapped Children in New York State, p. 1 ("As a parent or legal guardian in New York State, you should be informed about special education services and the right of all children to an education appropriate to their needs.").

[31] J.A. 335-337, 358-359. Nevertheless, the petitioner HHCSD contends that it will not even consider the placement of an interpreter in Amy's classroom unless she fails academically (e.g. J.A. 328). Inasmuch as Amy and her parents will never permit her failure (see pages 14-15, supra), HHCSD will never consider the placement of an interpreter in her classroom.

remedy for parents dissatisfied with the failure of their child's IEP to contain provision for a service concededly encompassed within the provisions of a State Plan is to attend public hearings of a State advisory council pursuant to 20 U.S.C. 1412(7). The decision of this court in Cannon v. University of Chicago, 441 U.S. 677, 99 S. Ct. 1946 (1979), makes clear that an individual will not be provided with "remedies" that leave him effectively remediless. However, there is no need to rely upon the Cannon decision, supra, or upon the decision in Cort v. Ash, 422 U.S. 66, 95 S. Ct. 2080 (1975), inasmuch as the Act contains provisions for a private right of action. [32]

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[32] A district judge shall review the administrative records, hear additional evidence at the request of a party, make an independent decision, based upon the preponderance of the evidence,

The petitioners contend that 20 U.S.C. 1415(e)(2) enables parents to invoke the Act's procedural safeguards only.[33] By the terms of section 1415, it is available to handicapped children and their parents "with respect to the provision of a free appropriate public education." Senator Williams elaborated on that language:

> [T]he language referring to "free appropriate public education" has been adopted to make clear that a complaint may involve matters such as questions respecting a child's individualized education program, questions of whether special education and related services are being provided without charge to

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and grant all appropriate relief. 20 U.S.C. 1415 (e)(2) and S. Conf. Rep. No. 94-455, p. 50, reprinted in Cong. & Adm. News, 1975, p. 1480, 1503. The petitioners agreed to adopt the procedures set forth in 20 U.S.C. 1415(e)(2), 20 U.S.C. 1412(5)(A), 1414(a)(7); 34 CFR 300.131, 237.

[33] That is yet another new and novel argument. In their petition for certiorari, the petitioners concede that a court has the authority "to determine whether the local district is providing a free appropriate public education." (page 31).

> the parents or guardians, questions relating to whether the services provided a child meet the standards of the State educational agency, or any other question within the scope of the definition of "free appropriate public education."
> 121 Congressional Record S. 37415, November 19, 1975.

The petitioners concede that an impartial hearing officer or a State Commissioner of Education may revise a handicapped child's IEP when the facts so require (Pet. for Cert., reply brief, pp. 10-11). A judge's authority under 20 U.S.C. 1415(e)(2) is at least as extensive as that of an impartial hearing officer or a State Commissioner of Education. [34]

Before the court of appeals, the petitioners conceded that Judge Broderick had authority to issue the order under review (J.A. 359-361).

[34] Judge Broderick indicated, quite appropriately the respondents believe, that his order of December 28, 1979 requires the

If a Federal jduge determines that an IEP fails to provide the child in question with a FAPE he can, under his authority to grant all appropriate relief, order that that IEP be revised to provide that child with a FAPE.

D. Under the Act, the parents of a handicapped child have an important role in the development of their child's educational program.

Each local public educational agency (such as HHCSD) must prepare an IEP for each handicapped child within its jurisdiction. 20 U.S.C. 1414(a)(5), 34 CFR 300.340 et seq., 130, 235. An IEP is to

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revision of Amy's IEP, but that he would not issue an order mandating compliance with an existing order while the matter is before this Court. Thus, the petitioners' only purpose in bringing this case before this Court is to work a stay specifically denied by the Federal Rules of Civil Procedure and specifically denied by the court of appeals.

to be written by a handicapped child's teacher, school personnel, his parents or guardian, and, whenever appropriate, the child himself. Among other things, the program must set forth the specific services to be provided to that child and the extent to which that child will be able to participate in regular educational programs. 20 U.S.C. 1401(19).

Active parental participation, through the IEP, is an important feature written into the 1975 Act; preparation of the IEP is a joint effort.

> The conferees have defined the individualized education program as a written statement . . . jointly developed by the local educational agency, the teacher, the parents, and the child, whenever appropriate. It is intended that all parties (the local educational agency, the teacher, the parents, and the child, whenever appropriate) will be involved throughout the process of establishment, review and revision of this program. (Emphasis supplied).

S. Conf. Rep. 94-455, p. 39, reprinted in Cong. and Adm. News, 1975, p. 1480, 1492. [35]

Nevertheless, Mr. and Mrs. Rowley were provided no opportunity to develop Amy's IEP or to provide input into the development of that program (J.A. 168-169). [36]

E. The contents of a handicapped child's IEP shall be based upon that child's individual needs.

Judge Broderick reviewed all the evidence, including the administrative records and the testimony of witnesses

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[35] Mr. Chatoff: Are you saying that parents and schools have to work together?

Mr. Denis: Absolutely. There is no better way.

J.A. 220.

[36] This is not a class action; it is a private action involving Amy and only Amy. E.g., J.A. 380-381; R. 37, plaintiffs' post-trial argument, pp. 6-7.

at the trial of September 26, 27, 28, and October 4, 1979, and ordered that Amy's IEP be revised to provide her with the services necessitated by her unique needs resulting from her deafness. Judge Broderick's order fulfills the requirements of the Regulations of the Commissioner of Education that services to handicapped children shall be individualized. [37]

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[37] Commissioner of Education of the State of New York, Gordon M. Ambach: ". . . [S]ervices to children in need of special education should be based on individual need, rather than on categorical classifications." Oversight Hearings on the Education for All Handicapped Act of 1975 Before the Subcommittee on the Handicapped of the Senate Committee on Labor and Human Resources, July 9, 26, and 31, and October 1, 3, 10, 1979, p. 1012, 1014.

"The formation of resource programs as instructional service options shall depend upon the nature of the child's capabilities and individual needs." Regulations of the New York State Commissioner of Education, section 200.4(c)(1).

"Unless the student's handicapping condition requires special classes, the student shall be educated in regular classes with appropriate supportive supplementary assistance." Id., section 200.4(a)(2).

By contrast, the petitioners furnished Amy with the services they determined to be the minimum necessary for any deaf child. See Pet. for Cert., App. K1. They did so upon being advised ". . . that all the State requires for a deaf child is that we provide one hour a day of individualized instruction from a teacher of the deaf. . ." (J.A. 326; Pl. Ex. 23, R.T. 325). The petitioners refused to acknowledge that section 200.4(d)(4) is modified by 200.4(c)(1) in order to provide individualization. [38]

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[38] Although the petitioners clearly did not comply with the Regulations of the Commissioner of Education, at no time did they present a motion to dismiss because of their alleged compliance with those Regulations. Prior to filing an answer, the petitioner school district filed a motion pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. The school district alleged compliance with a particular Regulation, solely for the purpose of showing

The petitioners question Judge Broderick's consideration of respondents'

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that the Commissioner was a necessary party defendant. Had the school district sought dismissal on the ground that it had complied with all applicable Regulations, it would have moved under Rule 12(b)(6); however, as the respondents' affirmation in opposition shows, that specifically was not done, because that would have resulted in an immediate hearing on the merits, whereas the petitioner school district sought to delay consideration of the merits for as long as possible.

The petitioners complain because Judge Broderick did not issue an Opinion when he denied the HHCSD motion to dismiss. Pursuant to Federal Rules of Civil Procedure, Rule 52(a), no such Opinion is necessary. The memorandum of law accompanying that motion (R. 10) argues, inter alia, that the plaintiffs must assert that the amount in controversy exceeds $10,000 in order to confer jurisdiction under 28 U.S.C. 1343 and urges reliance upon the pre-1966 version of FRCP, Rule 19.

Part 200 of the Regulations of the Commissioner of Education will be repealed and replaced effective July 1, 1982. After July 1, there will be no Regulation comparable to existing section 200.4(d)(4). Any school district in New York could implement all of the provisions of such revision during school year 1981-82; it is not known by the respondents if the petitioner school district elected to do so.

expert testimony. [39] A Federal judge is called upon to hear and decide controversies covering the entire spectrum of human activity. No judge, not anyone, can be so well versed that he is able to render judicious decisions on all matters before him without the presentation of expert testimony to acquaint him with the field in which he is called upon to decide. [40] The respondents called five experts for

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[39] The petitioners have themselves recognized the importance of expert testimony (e.g., brief, pp. 79, 95).

[40] ". . . [I]t it the very purpose of expert testimony to assist the trier of facts (in this case, a court sitting without a jury) to understand, evaluate and decide the complex evidential materials in the case." United States v. R.J. Reynolds Tobacco Co., 416 F. Supp. 313, 315 (DNJ, 1976).

that purpose -- four of whom had and have personal knowledge of Amy Rowley. [41]

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[41] Mrs. Rowley, Amy's natural mother, is a certified teacher of the deaf with more than six years experience. She testified to and submitted documentary material on her observation of Amy in her classroom over a one week period (J.A. 91-98).

Mr. Taras B. Denis has known Amy since infancy (J.A. 220-222). Mr. Denis is an Administrator at the New York School for the Deaf in White Plains.

Dr. A. Barbara Kligerman has tested Amy's hearing since May 1974 (J.A. 102-108). Dr. Kligerman is the Director of the Speech and Hearing Clinic of the Westchester County Medical Center.

Dr. Martin L.A. Sternberg spent several hours with Amy during the spring of 1979 to gauge her communication skills (J.A. 159-160, 215-216). Dr. Sternberg is a Professor at the New York University Deafness Research and Training Center.

Among the expert witnesses testifying for the respondents, only Dr. Donald F. Moores, the Head of the Division of Special Education and Communication Facilities at the Pennsylvania State University and a nationally recognized authority on the education of deaf children, testified on the general field of deaf education, without any personal knowledge of Amy Rowley.

The petitioners called three experts for that purpose.[42] In addition, Judge Broderick received two parent initiated independent educational evaluations (20 U.S.C. 1415(b)(1)(A) and 34 CFR 300.503(c)) prepared by two experts in the education of Deaf children and submitted to the Commissioner of Education.[43]

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[42] The petitioners place a great deal of weight on the fact that Amy did not attend to Mr. Cortez when Dr. Doctor and Mr. Cortez spoke with her after their visit to her school two days before the commencement of the trial. It would have been truly amazing if she had paid any attention at all to Mr. Cortez. Dr. Doctor and Mr. Cortez met with Amy for ten minutes (J.A. 235-236). Mr. Cortez signed to Amy for part of that ten minute discussion (J.A. 236). However, Mr. Cortez is not an interpreter; nor is he proficient in sign language (J.A. 236).

[43] Who is the preeminent expert on Amy Rowley's needs? Her mother, deaf herself, and a certified and experienced teacher of the deaf who has lived with Amy's deafness every day of Amy's life -- or an "expert up in Albany" (R.T. 10) who has never met Amy? Who knows more about Amy's unique needs, Mr. Denis, Dr. Sternberg, and the two experts in the education of deaf children who conducted individual educational evaluations of Amy or that illusory "expert

The statement on page 13 of the Pet. for Cert., Reply Brief, that the Commissioner raised the issue of cost in his brief to the Court of Appeals merely confirms the respondents' assertion that cost to the HHCSD had not been raised in the lower courts. The Commissioner asserted cost considerations relative to the provision of the "best possible"

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up in Albany"? Who knows more about the shortfall in Amy's comprehension resulting from her deafness, Dr. Kligerman, who has tested Amy periodically and regularly since 1974, or an audiologist reviewing the charts prepared by Dr. Kligerman when she administered those tests? Or maybe, instead of the "expert up in Albany," the real expert is Ms. Amy Toole, whose contribution to the matter was to advise the petitioner HHCSD on what she believed was the minimum service the school district could get away with (J.A. 326). Or perhaps the real experts are the employees of the HHCSD who have no educational backgrounds or experience in the education of deaf children. People like Dr. Zavarella, Ms. Pappas, Dr. Binder, and Ms. Globerman?

(optimal) education to handicapped children. Judge Broderick specifically rejected that standard. As Judge Broderick stated, "appropriate" can mean "adequate," "appropriate," or "optimal." The petitioners have never raised the issue of cost relative to an "appropriate" education nor have they offered any evidence that even obliquely impacts on cost relative to an appropriate education.

As previously noted, at the final pre-trial conference the attorney for the petitioner school district declared that "cost is not an issue in this case." "Attorneys at a pre-trial conference owe a duty to the court and opposing counsel to make a full and fair disclosure of their views as to what the real issues at the trial will be." Cherney v. Holmes,

185 F. 2d 718, 721 (Seventh Circuit, 1950). See also, United States v. Maryland and Virginia Milk Producers Association, 22 F.R.D. 300, 302 (DC, 1958). The respondents relied on that assertion. See App. II. [44]

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[44] If the petitioners really believe that cost is an issue, and not merely a divertisement, they should have raised it three and a half years ago -- then there would be something on the Record for this Court to review. "For a government agency best familiar with its own practice with respect to a matter directly in issue, and now said to be of paramount importance, to make no mention of the subject matter until after it had lost the case on another ground, if deliberate, is a breach of duty to the court and, if inadvertent, is still inexcusable. . ." Carr v. Federal Trade Commission, 302 F. 2d 688, 692 (First Circuit, 1962).

POINT II

RESPONDENTS EXHAUSTED ALL ADMINISTRATIVE REMEDIES PRIOR TO INITIATING SUIT.

The petitioners concede that the respondents exhausted all administrative remedies and that the district court had jurisdiction to review Amy's educational program for school year 1978-79.[45] However, they argue that upon the completion

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[45] Administrative and judicial review would not be precluded if the petitioners would comply with the issued order (see note 10, supra).

At no prior stage in the proceedings has the petitioner HHCSD contested the jurisdiction of the district court. Indeed, at the commencement of the hearing in this case, the attorney for the HHCSD stated:

> It makes little sense to me to have to go back, to go through the Committee hearings -- well the Committee has already made its determination -- to go through the independent hearing officer, to go through the review of the Commissioner when basically the facts haven't changed. That is a conclusion, and again, that is some-

of school year 1978-79, the matter became moot and that the court could not have jurisdiction under 20 U.S.C. 1415(e)(2) for school year 1979-80 until all administrative procedures set forth in section 1415 had been completed with respect to Amy's IEP for school year 1979-80. Inasmuch as the matter would not then be ripe for judicial review until after the end of school year 1979-80, by that time the matter would again be moot and it would be necessary to start

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> thing that your Honor will have to determine as a result of this hearing. But it is my feeling that the facts haven't changed substantially. (R.T. 17).

During the oral argument before the court of appeals, the attorney for the school board conceded that the district court had jurisdiction to grant the relief requested and granted (J.A. 359-362).

again during school year 1980-81, ad infinitum.[46] In essence, the petitioners argue that the procedural safeguards established to protect the rights of parents of handicapped children, which culminate in judicial review, effectively preclude such review.

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46 The respondents did not delay consideration of the controversy for even one day; they have continually objected to the delaying tactics of the petitioners (e.g., R. 6; R. T. 10, 21; J.A. 59-62). However, assuming, arguendo, that the petitioners had been paragons of rectitude, this matter would still be moot according to their reasoning. On June 18, 1979, had the school district filed an answer and, on that same day had Judge Broderick reviewed the administrative records and issued an order requiring placement of an interpreter in Amy's classroom for one or two days remaining in school year 1978-79, the petitioners would have appealed, thereby staying implementation of the order. At the end of the school year (one or two days after issuance of the order), the matter would be moot. The moot order

It is hornbook law that courts shall not interpret Congressional statutory language in such a manner as to render it meaningless and ineffective. United States v. Menasche, 348 U.S. 528, 538-539, 75 S.Ct. 513 (1955); Bird v. United States, 187 U.S. 118, 124, 23 S.Ct. 42 (1902); Federal Trade Commission v. Manager, Retail Credit Co., Miami Branch Office, 515 F.2d 988, 994-995 (District of Columbia Circuit, 1975).

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would never be implemented and would never be subject to judicial review.

Amy Rowley is deaf; barring the discovery by medical science of a cure for deafness, she will be deaf for the rest of her life. Her parents will object to any arrangement, in any school year, that fails to provide her with the service necessary to enable her to understand what is said in her classroom, despite her deafness. Thus, administrative procedures and judicial review in any school year would involve consideration of the exact same question: What service must Amy receive to compensate for her deafness?

Were the argument of the petitioners to be adopted, no court would ever be able to review Amy's IEP for any school year. Where jurisdiction exists, as it does here, it does not

terminate when there is a likelihood that the same situation will be repeated again in the future. The well recognized exception to the mootness doctrine, as enunciated by this Court, assures that an aggrieved individual will be entitled to his day in court. Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 514-515, 31 S.Ct. 279 (1911); Nebraska Press Association v. Stuart, 427 U.S. 539, 546, 96 S. Ct. 2791 (1976); Roe v. Wade, 410 U.S. 113, 123-125, 93 S.Ct. 705 (1973).

The Act, 20 U.S.C. 1415(e)(2), grants jurisdiction to Federal district courts with respect to the original complaint filed thereunder "and all matters relating thereto" (Senate Conf. Rep. No. 94-455, page 50, reprinted in

Cong. and Adm. News, 1975, page 1503; and 121 Congressional Record S 37416, November 19, 1975 (remarks of Sen. Williams)), and to grant any appropriate relief. By the passage of the 1975 Act, Congress sought to assure that the parents of disabled children would not have to go to court continually to protect the rights of their children, not that those parents would be denied access entirely to the courts of this country. Senate Report No. 94-168, page 9, reprinted in Cong. and Adm. News, 1975, page 1433 (e.g., Selelyo v. Drury, 508 F. Supp. 122, 126-128 (S.D.Ohio, 1980)).

Even assuming, arguendo, the correctness of the argument of the petitioners, it is a recognized

principle of law that a party need not exhaust administrative remedies when such action would be futile. See, for example, Porter County Chapter of the Izaak Walton League of America, Inc. v. Costle, 571 F.2d 359, 363 (Seventh Circuit, 1978). During the Senate Floor debate on the conference report on S. 6 of the 94th Congress, the Education for All Handicapped Children Act of 1975, Senator Williams, the Floor Manager, said:

> I want to underscore that the exhaustion of administrative procedures established under this part should not be required for any individual complainant filing a judicial action in cases where such exhaustion would be futile either as a legal or practical matter . . .
> 121 Congressional Record S 37416, November 19, 1975.

Because a child continually grows and matures, delay will serve only to frustrate the purposes of the Act -- to provide handicapped children with appropriate services.[47] Nevertheless, the petitioners argue that the

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47 ". . . [D]elay in resolving matters regarding the education program of a handicapped child is extremely detrimental to his development. The interruption or lack of the required special education and related services can result in a substantial setback to the child's development. . . [I]t is expected that all hearings and reviews conducted pursuant to these provisions will be commenced and disposed of as quickly as practicable consistent with fair consideration of the issues involved." 121 Congressional Record S 37416, November 19, 1975 (remarks of Sen. Williams). See also, id. at 37410-411 and 121 Congressional Record S. 19482, June 18, 1975 (remarks of Sen. Randolph).

office of the Commissioner must be given a second chance "to correct its own mistakes" (petitioners' brief at p. 96)[48] at the expense of the educational opportunity of a child not responsible for those mistakes. The short answer is that remand is a matter within the discretion of the trial judge in his consideration of "appropriate relief," including consideration of such matters as delay, the futility fo such action, and the possibility and probability that such remand would serve only to permit the state educational agency to cover up those mistakes (see note 12, supra).

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[48] Much of the Commissioner's independent decision is copies from the decision he was supposed to review (R. A. 343-345).

POINT III

THE COURT OF APPEALS DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The judges of the court of appeals acted in accordance with their responsibilities under Canon 3(A)(5) of the Code of Judicial Conduct.

More than 60 years ago, at a time when the calendars of the courts of appeals were not nearly as crowded as they are today, this court declared that a court of appeals acted properly when it handed down a decision without any opinion at all. Texas and P.R. Co. v. Hill, 237 U.S. 208, 215, 35 S.Ct. 575 (1915).

At the oral argument before the court of appeals, the petitioners conceded that:

1. they must provide Amy Rowley with a FAPE (J.A. 332);

2. they must provide Amy Rowley with an equal educational opportunity (J.A. 346, 350-351);

3. the New York State Plan and the Regulations of the New York State Commissioner of Education encompass the provision of a sign language interpreter for a deaf child when that service is found necessary to provide that child with a FAPE (J.A. 335-337, 358);

4. the respondents (plaintiffs) were entitled to seek and Judge Broderick had authority to grant a mandatory injunction (J.A. 359-361); and

5. they did not disagree with the standard set forth by Judge Broderick (J.A. 354).

The petitioners asserted that their case depended upon the evidence (J.A. 362), thereby acknowledging that this case presented only a question of fact. The overwhelming evidence presented by the respondents could lead to only one result.

Judge Broderick weighed and evaluated the evidence with great care (Pet. for Cert., A-7; 632 F.2d 945, 948); the court of appeals reviewed the record carefully (Pet. for Cert., App. A-5; 632 F.2d 945, 947).[49]

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[49] "The policy underlying the 'two-court' rule is obvious. This court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues. When, as here, resolution of the disputed factual issues turns largely on an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court, the rule has particular force . . ." Berenyi v. District Director, Immigration and Naturalization Service, 385 U.S. 630, 636, 87 S. Ct. 666, 17 L.Ed.2d 656 (1967). See also, Workman v. Mayor, Etc., City of New York, 179 U.S. 552, 21 S.Ct. 212, 45 L.Ed. 314 (1900); International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42, note 7, 99 S.Ct. 2121, 60 L.Ed.2d 698 (1979). The rule is of even greater importance in this case because four of the witnesses for the respondents who are deaf, including Mr. and Mrs. Rowley, testified using total communication, which is visual in nature. Per force, Judge Broderick, and only Judge Broderick, was able to assimilate that testimony.

The statement that the decision is based upon "the unique facts" of this case is merely a restatement of the intent of the Act: that each case shall be decided on the "unique needs" of each child.

At page 104, the petitioners concede that the decision of the court of appeals does justice in the case of Amy Rowley. Even assuming, arguendo, some merit to any of the petitioners' newly discovered theories, the decision of a lower court shall not be disturbed if it is consistent with "substantial justice" and the "substantial rights of the parties." Rule 61, Federal Rules of Civil Procedure. See also, 28 U.S.C. 2111; Land O' Lakes Creameries, Inc. v. Commodity Credit Corporation, 308 F.2d 611 (Eighth Circuit, 1962). ("[I]f there was any error committed

by the District Court in its statement of Conclusion of Law No. VI supra it could be no more than harmless error and such error would not warrant reversal of the judgment in this case."); Carpenters District Council of Denver and Vicinity v. Brady Corporation. 513 F. 2d 1, 4 (Tenth Circuit, 1975).

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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TRANSCRIPT OF DISTRICT COURT
PROCEEDINGS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
79 Civil 2139

----------x

AMY ROWLEY, by her parents and natural guardians, Clifford and Nancy Rowley, and Clifford and Nancy Rowley, in their own right,

Plaintiffs,

-against-

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, etc., et al

Defendants.

----------x

Before:
HON. VINCENT L. BRODERICK
District Judge

New York, September 26, 27, 28, October 4, 1979

Pages 77-80

Q What are some activities with Amy using either total communication or an interpreter?

* * * * * * * *

A Amy has been getting total communication since she was young, ever since she was born. She has learned a lot from our communication and from her brother and cousin and aunt. Even when we go outside the home, she still gets all the communication from us, asking questions; we give her

answers. We are so involved in so many things that we have many hearing friends who are skillful in total communication, signing, signing to Amy. She is so engrossed that she has picked up so much knowledge. It is from interpreting -- she has an interpreter in church and in Sunday school. Even when we go to see a play, for the county, they will provide her with an interpreter, for plays such as "Sleeping Beauty," "Little Red Riding Hood," things like that, and going to Washington, New York City to see plays that do provide interpreters or signing.

And this month she has observed very skillful memorial services for two hours, just concentrating so much that she has picked up a lot from the services.

She also had been visiting the museum, where they have provided sign language interpreters.

All these things have really enriched her, that makes her up to level with her peers today.

We also have a literary circle once a month -- I mean once a year provided in our home, and the hearing person again, who will be the speaker, will also have an interpreter.

Amy has participated in those kinds of things. Much of her life has been with total communication.

Q You talked about church and Sunday school.

Do you belong to a church for the deaf or did you make special arrangements with your church to have interpreters available for your husband, you and Amy?

MR. SHERMAN: I am going to object to this as really not relevant to our inquiry here today. Aren't we talking about educational placement here?

THE COURT: Yes, we are. I think I'll make the same ruling. I overrule the objection and I will, of course, consider all of these objections afterwards when I am deciding this matter.

MR. SHERMAN: Yes, your Honor.

Would you read the question, Mr. Reporter?

(Question read.)

A We made an effort to get services in our church. We do not belong to the church for the deaf. The interpreting is provided and it has worked our beautifully. The people really love it. They love it so much, they see how much of a communication gap is covered.

Q Could you try and estimate Amy's level of comprehension without total communication?

A I would say 50 percent. But that could be much less with people who have a different formation of the mouth, the face or the background. It may be dark. Maybe Amy would not be familiar with the content, and maybe the man might have a mustache or a beard.

AFFIRMATION OF MICHAEL A. CHATOFF:
RESPONSIBILITY FOR ANY DETRIMENT
TO PLAINTIFF'S EDUCATION
Docket No. 22
(Title omitted in printing.)

STATE OF NEW YORK)
COUNTY OF QUEENS) :

MICHAEL A. CHATOFF, affirming under pain of perjury, says:

1. I am the attorney for the plaintiffs in the above-entitled action and I am familiar with the proceedings herein.

2. On July 13, 1979, in Chambers, and at all times prior thereto, the attorney for the defendant, Hendrick Hudson Central School District, argued that the retention of an interpreter for Amy Rowley would be financially devastating for the school district.

On August 17, he argued that cost is not a factor; that the defendant school district refuses to appoint an interpreter for Amy Rowley because an interpreter would be detrimental to her educational development. See also, August 21, 1979 Affidavit of Dr. Joseph P. Zavarella and the August 23, 1979 Affirmation of Raymond G. Kuntz.

3. I submit that as a result of this alteration of the argument of the defendant school district, no controversy exists anymore. Mr. and Mrs. Rowley will enter into a stipulation that they will assume responsibility for any detriment to Amy's educational development resulting from the use of an interpreter for her.

* * * * * * *

Dated: Jamaica, New York
August 27, 1979

MICHAEL A. CHATOFF

I declare and affirm under penalty of perjury that the foregoing is true and correct. Executed on August 27, 1979.

No. 80-1002

Office-Supreme Court, U.S.
FILED
MAR 15 1982
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Petitioners,

—against—

AMY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY in their own right,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR CERTIORARI FILED DECEMBER 15, 1980

PETITION FOR CERTIORARI GRANTED NOVEMBER 2, 1981

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ARGUMENT

1. New York State's plan, submitted to and approved by the Commissioner of Education, contains detailed provisions for education of the deaf, and the school district is in full compliance with that plan.

Respondents and their amici contend that the school district did not raise the state plan argument in the lower courts and should be precluded from raising it in this Court (brief of National Association of the Deaf et al., pp. 25-28; brief of the United States, pp. 9-10). The United States also inaccurately contends that the petitioners now raise two arguments developed after the filing of the petition for the writ of certiorari, in reliance upon the decision in Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981). The challenged arguments are that the Education for All Handicapped Children Act of 1975, 20 U.S.C. §1401 et seq., created no substantive rights against

the states for free appropriate public education; and that, in accepting federal aid, the states did not consent to a review procedure whereby the courts would ultimately direct the states as to what education is appropriate. Neither assertion is accurate.

In its reply memorandum of law, submitted to the district court in support of its motion to dismiss the complaint (R.A. 332-333), the school distict argued that it was in full compliance with the state plan for the education of deaf children, and that the respondents had not alleged in their complaint that the district had denied Amy Rowley a free appropriate public education. At the hearing on the motion, the attorney for the respondents admitted that the school district was in compliance with the state plan and the regulations implementing it, but argued that such compliance was

irrelevant. The issue was again raised by the school district in its main brief to the court of appeals (p. 15) and in the petition (pp. 21-33).

In its reply brief in the court of appeals (pp. 6-9), the school district argued that education is not a right afforded explicit or implicit protection under the Constitution, that the obligation to provide a free appropriate education to handicapped children is undertaken only as a condition for the receipt of federal aid, and that the obligation is limited to the representations made by the state in the plan submitted to the Secretary of Education. Those assertions were also made in the petition (pp. 29-33). Pennhurst had not been decided at the time the petition was submitted. While the petitioners have utilized the concepts set forth in Pennhurst to explicate their arguments,

these arguments were advanced in the courts below.

Central to the position of the respondents and their amici is the proposition that the language of 20 U.S.C. §1415 (Procedural Safeguards) gives the court to which the appeal has been brought the power to conduct a de novo review, and to devise an appropriate education. The brief submitted by the Association for Retarded Citizens of the United States et al. states that Congress deliberately stripped the states and local school districts of the right to ultimately determine educational programs under the Act because they had "been discredited by their history of ignoring handicapped children." The brief alleges that recourse to a decision maker independent of the education system was seen by Congress as a way to make state and local education agencies "directly

accountable to handicapped children and their parents" (p.21). The position of the respondents and their amici can be summarized as follows: any state which applies for and receives funding under the Act cedes to independent hearing officers and to the courts the right to ultimately determine what is an appropriate education for a handicapped child.

While contending that the procedural safeguards of the Act give the courts absolute discretion to devise appropriate educational programs, the respondents and their amici nonetheless contend that the states do not have unlimited liability. The brief of the Maryland Advocacy Unit for the Developmentally Disabled, Inc. et al. contends that New York State's plan does not list or identify particular services, and that consequently the State has agreed to provide any services found by a court to

be appropriate (pp. 9-10). It argues that, if the State wanted to limit its liability, it should disclose in its plan what it will not do, and appeal any adverse decision over such disclaimer to the appropriate court of appeals (p. 10).

The premise that New York State's plan did not list or identify particular services is false, and the hypothesis that the state plan should list what it will not provide, rather than what it will, is unworkable. As Judge Mansfield stated in his dissenting opinion in the court below (Pet. App. A-11; 632 F.2d 945, 949), the State's plan incorporates sections of New York Education Law, and the regulations of the Commissioner of Education, which detail the specific services to be provided to deaf children. Those services do not include provision of sign language interpreters. While it is true that the actual plan was not

submitted to the courts below, the respondents admitted in open court that the school district was providing the specific services required by the plan. They argued, however, that such compliance was irrelevant in light of the parental demand for a sign language interpreter.

The respondents contend that, since §1415 gives parents "an opportunity to present complaints with respect to . . . the provision of a free appropriate education to such child," (§1415(b)(1)(E)) and allows a court, upon appeal, to "grant such relief as the court determines is appropriate" (§1415 (e)(2)), the state has agreed to place in the hands of the courts the power to allocate unlimited funds, to modify the state plan and its goals, and to substitute whatever program the court deems is appropriate. Judge Broderick stated

this view when he said:

> Aside from the HEW regulation quoted above, it has been left entirely to the courts and hearing officers to give content to the requirements of an "appropriate education." (emphasis supplied) Pet. App. C-11; 483 F.Supp. 528, 534.

That view of the Act is not consistent with the language of §1412 (Eligibility Requirements), §1413 (State Plans), §1414 (Application), §1416 (Withholding of Payments, Judicial Review), and §1418 (Evaluation).

To be eligible for financial assistance, a state must demonstrate that it has a policy which assures all handicapped children the right to a free appropriate public education (§1412(1)); that it has developed a plan which sets forth the policies and procedures which it has undertaken to assure that it has established a goal of providing full educational opportunity to all handicapped children (§1412(2)(A)); and that a free

appropriate public education will be available for all handicapped children within certain age categories by certain dates (§1412(2)(B)).

In developing its plan, the state must set up a procedure by which individuals concerned with the education of handicapped children can comment upon the state's policies, programs and procedures prior to their adoption, at public hearings conducted on adequate notice, at which they have an opportunity for comment. §1412(7).

The plan itself must set forth the policies and procedures designed to assure that the funds will be expended: first, to achieve the goal of helping handicapped children who are receiving no education; next, to assist those with the most severe handicaps, within each disability, who are receiving inadequate education; and finally, to achieve the

goal of providing a free appropriate education for all handicapped children within the state. §1413(a)(11)(12).

Local school districts applying to the state for federal funding must submit similar plans to the state, describing their priorities and goals. §1414(a). If the Secretary has approved the state's plan, the state may approve local applications which it determines are in conformity with the Act. §1414(b). If a local school district is unable or unwilling to meet the conditions of the Act, the state may utilize the funds otherwise allocable to the local school district to provide education and services in a manner it considers appropriate, consistent with the Act. §1414(d).

If the Secretary finds that a state plan is not in conformity with the Act, he may withhold funding or terminate

existing funding. §1416(a). A state may petition the court of appeals for the circuit in which the state is located for review of the Secretary's decision. §1416(b).

The Secretary is required to measure and evaluate the impact of the Act and the effectiveness of state efforts to assure a free appropriate public education, and to report annually to Congress on the number of children who need special education and related services, as well as the number who, within each disability, are receiving a free appropriate public education, and the number who are not. §1418(a).

Under the Act a free appropriate public education is a goal, rather than a federal mandate. The Act contemplates that the scope of a state's program will be the subject of public debate before it is submitted to the Secretary for

approval. §1412(7). It envisions that the debate will address specific efforts directed toward particular classes of handicapped pupils (§1412(3); §1414(a)(1)(C)(ii)), within the scope of the state's resources and priorities.

The Act asks the states to classify their handicapped children by type of handicapping condition, and to plan different programs for such classes, on the basis of whether they are receiving no education, or an inadequate education. It holds out to the states a review procedure by which the Secretary determines whether the plan submitted is in conformity with the Act. It then requires the states and the Secretary to monitor their performance in achieving the goals of the Act.

Taken together, §1412 (Eligibility Requirements), §1413 (State Plans), §1414 (Application), §1416 (Withholding of

Payments; Judicial Review), §1418 (Evaluation), and the regulations governing the submission of the state annual program plan (45 C.F.R. §121a.110 et. seq.) indicate clearly that the method of attaining the goal of a free appropriate public education is a matter of state concern and choice. In making that choice, the state can opt to provide one form of remediation rather than another, i.e., instruction by certified teachers of the deaf for deaf pupils instead of sign language interpreters, and obtain from the Secretary a determination that its plan is in conformity with the requirement that it provide a free appropriate education.

There is nothing in the law or the regulations which suggests, even remotely, that the plan submitted must guarantee to do anything, at whatever cost, in anticipation of a ruling by a

hearing officer or a court pursuant to §1415.

A proper construction of the role of §1415 is the one adopted by the court in McCowen v. Hahn, ____ F.Supp. _____, EHLR 533:131 (N.D. Ill. 1981), i.e., that the power of review is limited by the language of subsection (a) of §1415, which mandates review only of the procedure by which the child has been identified, evaluated, placed, or provided a free appropriate public education. That construction of §1415 will preserve the traditional roles of the state and the local school districts as the primary providers and determiners of educational services.

Petitioners have never alleged that a state plan which does not include a certain service precludes provision of that service, if the state agency or local school district determines that

the service is necessary for a particular child. However, the determination to provide such service must be left to the administrative personnel of the educational agencies, as they are aware of the child's unique needs, are experts in the field of education, and are familiar with local financial burdens. They alone are capable of evaluating the needs of the individual child and the services necessary to meet those needs, and of balancing the needs against budgetary constraints. It is entirely proper for them to determine to provide a service to a particular child, even though it is not contained in the state plan. The same cannot be said for the courts.

The construction urged by the respondents destroys fundamental constitutional distinctions, and removes from the states their traditional and hallowed

authority over the quality and quantity of educational services. Such a removal is not to be accomplished lightly. The Act does not make a plain statement to the effect that, when a state submits a plan to the Secretary, under sections which describe the plan as a goal and which give the state wide latitude in determining what its plan shall contain, the state thereby concedes to hearing officers and courts, under §1415, the right to set aside the plan and to substitute an entirely new plan, regardless of the consequences or the cost. If that is the intent of the Act, it is not clearly articulated on its face. It thus fails to meet the test of knowing acceptance set down for funding statutes under Pennhurst.

2. The definition of free appropriate public education formulated by the district court, and confirmed by the court of appeals, should be overturned.

The Act contains a definition which delineates the parameters of the free appropriate public education to be provided to handicapped pupils, but which is sufficiently general in scope to allow application of the definition to the unique individual needs of each handicapped child. The Act and regulations define free appropriate public education and its components: special education and related services. 20 U.S.C. §1401(18)(16)(17); 45 C.F.R. §121a.4,.14,.13.

If this Court determines that the statutory definition is overly broad or vague, and that a clearer and more precise standard is required in order to gauge whether a free appropriate public education is being provided in a given

instance, the definition formulated by the district court is not an appropriate replacement, as lack of clarity and precision are the very defects from which it suffers.

The district court held that in order to provide a free appropriate public education

> each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children. Pet. App. A-C 10; 483 F.Supp. 528, 534.

It then stated that the standard requires

> that the potential of the handicapped child be measured and compared to his or her performance, and that the resulting differential or "shortfall" be compared to the shortfall experienced by non-handicapped children. Pet. App. A-C 13-14; 483 F.Supp. 528, 535.

The test enunciated by the court is impossible of implementation, and fails to provide guidance to state and local educational agencies, as no tests to

measure potential presently exist, and many factors beyond the control of such agencies influence both shortfall and potential. Respondents' amici recognize the unwieldiness and unworkability of the test. In urging adoption of the district court definition, they characterize the test for determining its application as a gloss on the standard which may be rejected by this Court,[1] as measurements and comparisons which are not required for an equal opportunity approach,[2] as a flaw in the formulation,[3] and as dicta which is not necessary for the holding,

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[1]Brief of the United States, p. 14

[2]Brief of the National Association of the Deaf et al., p. 21 N.9

[3]Brief of the American Civil Liberties Union, p. 25 N.6

and which was not incorporated in the Second Circuit's affirmation.[4] The test requires measurements of potential and shortfall, which in practice are impossible. Even if the district court's definition of free appropriate public education is upheld, petitioners submit that the test which the district court required should be invalidated.

Given the impossibility of applying the test, the question then becomes whether the definition itself is so much clearer and more precise than the statutory definition, that this Court should allow a judicial construction to usurp the statutory delineation of a free appropriate public education.

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[4]Brief of the United Cerebral Palsy Association, Inc. et al., p. 15 Note

Even if the measurements mandated by the district court are eliminated, the definition requires evaluation of "full potential" and measurement of the constituent elements of an opportunity to achieve it. Is this, on its face, a clear and precise standard against which the special education and related services provided to a handicapped child can be measured? A review of the briefs submitted by the respondents and their amici demonstrates that the question must be answered in the negative, as the briefs contain quite different interpretations of the definition.

In its brief, the United States argues that the issue is neither relative potential nor relative achievement, but equal access to the educational process (p. 14 N.6). The National Association of the Deaf et al. hold that the

definition requires those items which are necessary to provide handicapped children with an educational opportunity commensurate with that available to the non-handicapped (p. 20). The brief by the American Civil Liberties Union states that the definition requires provision of an educational program which minimizes the effects of the handicapping condition (p. 21, 25 N.6). United Cerebral Palsy Associations, Inc. et al. argue in their brief that commensurate opportunity is a comparative perspective which provides a concrete framework for judicial review of factors such as hours of instruction, delays in placement, curriculum standards and enrichment activities (pp. 16-17). Respondents' brief states that the district court formulated an input standard: an opportunity to achieve,

equivalent to the opportunity provided to other children (p. 6). These interpretations not only differ, they also fail to elucidate the meaning of the definition in any practical way.

The foregoing reveals that the district court's definition, even without the requirements for measurement of shortfall and potential, creates more problems than it solves. If the amici addressing the Court cannot agree on a single interpretation of the definition, how are local and state educational agencies to be guided by it, and how are hearing officers and courts to apply it to unique cases with any consistency? While the statutory definition is a flexible standard which sets forth the scope of the special education and related services to be provided to handicapped children, the district court

definition is a comparative one, which requires measurement of intangibles, such as potential and opportunity to achieve. The inherent difficulties with this comparative definition, and the evaluations which must be made in order to apply it, create great confusion when an attempt is made to use it as a standard. Varying interpretations contained in the briefs of the amici are attempts to clarify the standard. Thus, the district court, rather than improving upon the statutory definition, has appended to it an unnecessary and confusing gloss.

Assuming, arguendo, that this Court reaches a determination that neither the definition of free appropriate public education contained in the Act and regulations, nor the definition devised by the district court, is appropriate, a new definition in keeping with the

legislative intent must be formulated. Respondents and their amici argue that the standard proposed by Judge Mansfield in his dissenting opinion, i.e. self-sufficiency for the handicapped, cannot have been the intent of the legislature, since that goal is applicable only to certain retarded children. In developing that standard, Judge Mansfield stated:

> The legislative history of the Act reveals that Congress was simply concerned with ensuring that handicapped children would become independent, productive citizens rather than that their potentials be compared with those of the non-handicapped. Pet.App. A 16-17; 632 F.2d 945, 952.

Congress did not intend that handicapped children be provided merely with an opportunity to learn to feed and dress themselves. Obviously many handicapped children are capable of doing that before they begin their education. However, neither did Congress intend that local

and state educational agencies provide handicapped children with an opportunity to either maximize their potential or achieve their full potential. According to Judge Mansfield's analysis,

> [t]he language and legislative history of the Act demonstrate that Congress visualized a much more practical objective, i.e., an education for each handicapped child that would enable the child to be as free as reasonably possible from dependency on others, would enable the child to become a productive member of society, and would hopefully promote academic achievement by the child that would roughly approximate that of his or her non-handicapped classmates. Pet. App. A-19; 632 F. 2d 945, 953.

State and local educational agencies should not be held accountable for the achievement of the potential of handicapped children, when no such requirement exists for the non-handicapped. Variations in the maturity, abilities and family background of all children make this an impossible goal. All that

should be required is the provision of an adequate education to all children, in a setting which allows them to acquire academic expertise, social skills and moral values necessary to become functioning members of society. The purpose of the Act is to ensure that handicapped children are not denied this requirement; and, given the balance that must be struck between fiscal constraints and provision of services, that financial hardships do not weigh more heavily upon the handicapped than on the so-called "normal" majority.

3. The finding of the district court that Amy Rowley needs a sign language interpreter was clearly erroneous, in that it was not supported by the evidence.

The regulations define deaf, for the purposes of the Act, as:

> A hearing impairment which is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, which adversely affects educational performance. (emphasis supplied) 45 C.F.R. §121a.5(a) (1).

The district court's conclusion that Amy Rowley requires a sign language interpreter in her mainstream classroom was based on a finding that she understands only 59% of what takes place in class. That finding was not supported by the evidence adduced at trial, and the decision based on that finding should be reversed.

At the hearings before the independent hearing officer and the district court, petitioners introduced detailed,

uncontroverted evidence that Amy Rowley comprehends the academic materials taught in her class, that the physical situation in the classroom aids in maximizing use of her residual hearing and excellent lipreading skills, and that she has excellent rapport with her teachers and peers. J.A. 42-48, 227-228, 231, 239-242, 257-269, 275-276, 278-279, 302. Testimony of people who had observed and worked with Amy in the classroom setting, as well as evidence as to her academic performance and standardized test scores, presented a picture of a child of high-average intelligence who understands the concepts presented in class and whose academic performance is appropriate to her intellectual level. J.A. 277-282; R-T 54; R-A 74, 98; R-E 39-62.

The finding of the district court that Amy Rowley understands only 59% of what transpires in her classroom is

based, not on the evidence of her comprehension of academic materials or understanding of events that take place, but rather on the results of an audiological test which measured her ability to hear discrete sounds in a laboratory setting.[5] By equating the ability to hear only 59% of the sounds presented in an audiological test to the ability to understand only 59% of what transpires in the classroom, the district court made an unwarranted leap, and ignored the evidence.

There is a distinction between hearing sounds and understanding meaning.

---

[5]It should be noted that a variety of audiological reports were introduced into evidence. The results ranged from a low of 27%, to a high of 84%. (When the test was given with total communication she scored 100%. However that was not a test of her ability to hear.) Pet. App. C-20; 483 F.Supp. 528, 533.

Although Amy Rowley cannot hear every sound in the classroom, the testimony amply demonstrated that she grasps the meaning of what transpires there. She has excellent lipreading skills, and her good residual hearing in the low frequencies, which enables her to hear the vowel sounds, is supplemented electronically. Body language, facial expressions, and contextual clues all convey meaning, and do not require an ability to hear in order to understand.

The fact that Amy Rowley performs well academically and receives high scores on standardized tests shows that she does in fact understand what transpires in her classroom. Dr. Barbara Ann Kligerman, the audiologist who has tested Amy over the years, testified in district court that there is a distinction between tests for hearing and tests for comprehension, and that school vocabulary tests

are a better measure of understanding and comprehension than are tests which measure hearing. R-T 138-140. Her high test scores demonstrate her comprehension of the information imparted in her class. R-E 39-62.

The district court's determination that Amy was not receiving an appropriate education was derived from inferences drawn from testimony about deaf children in general, without reference to how Amy was actually performing in an academic setting. The determination was clearly erroneous.

The district court constructed a definition of free appropriate public education, and developed a test to determine whether such an education was being provided to handicapped students. The court then determined that, based on the evidence before it, it could not apply

the test to Amy Rowley. The court therefore abandoned the test it had developed. It determined that Amy Rowley required a sign language interpreter, because respondent's witnesses, who had never observed Amy in class, testified that every deaf child fares better in a class with an interpreter. Under §1401 (16), the education that is to be provided to a handicapped student must be designed to meet the unique needs of the individual, rather than the perceived needs of a class of handicapped.

At the district court hearing the petitioners did not introduce evidence as to opposing schools of thought on education of the deaf, as the issue before the court was whether Amy Rowley required an interpreter, not whether total communication is the preferred philosophy of education of the deaf. However, the fact remains that total

communication is not the only method of education espoused by educators of the deaf, and many studies have demonstrated the advantages of other approaches.[6] In Amy's case, provision of an interpreter is unnecessary, as she is performing extremely well in school. Provision of an interpreter could hinder improvement of her well developed lipreading skills, and lead to a decline in the use of her residual hearing. Studies have shown that use of lipreading skills and residual hearing tend to decline in

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[6]See, e.g., Brill, The Mythology of Interpreters for Deaf Elementary Pupils, 33 Deaf American 17 (1981); Nix, Total Communication: A Review of the Studies Offered in Its Support, 77 Volta Rev. 470 (1975); Oral Education Today & Tomorrow (A. Mulholland ed. 1981).

direct proportion to an increasing use of sign language.[7]

The court of appeals found it unnecessary to reach the issue of whether the district court improperly admitted three affidavits post trial, submitted to but not considered by the Commissioner of Education, on the ground that the respondents had met their burden of proof without them. The decision inaccurately attributes the lack of consideration to the independent hearing officer. See footnote 6, Pet. App. A-7, 632 F.2d 945,

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[7]See, e.g., Northcott, Freedom Through Speech: Every Child's Right, 83 Volta Rev. 162 (1981); Carson & Goetzinger, A Study of Learning in Deaf Children, 15 J. Auditory Research 73 (1975); Gensema & Trybus, Communication Patterns and Educational Achievement of Hearing Impaired Students, data from the National Achievement Test Standardization Program for Hearing Impaired Students, Office of Demographic Studies, Gallaudet College (1978).

948. However, the court of appeals based its affirmance on "certain critical evidence," among which were "observations of her in the classroom that [show] Amy misses a substantial part of what goes on in her classroom." Pet.App. A-6; 632 F.2d 945, 947-948. All the evidence, except that contained in the disputed affidavits, was to the contrary.

Judge Mansfield characterized the decision to admit the affidavits post trial as patent error amounting to a denial of due process. He said that Judge Broderick had relied upon the affidavits, and that such reliance formed a critical part of his decision since:

> they constituted the only evidence in favor of the plaintiff's position which was based on observation of Amy. (emphasis supplied) Pet. App. A-23; 632 F.2d 945, 955.

Judge Mansfield pointed out that, since Judge Broderick actually relied on the

affidavits, the court of appeals was in no position to say what his opinion would have been had they not been erroneously admitted and considered by him.

Two of the affiants (Mary Sheie and Nancy Rowley) testified at the hearing before the independent hearing officer, but not about Amy's classroom performance. Nancy Rowley testified in district court, again without reference to Amy's classroom performance. The respondents obviously did not want the evidence in the affidavits subjected to cross-examination.

The court of appeals also included in its recitation of critical evidence the following statement.

> Many sounds are not visible on the lips and communication is impossible when the teacher and students are not facing Amy. Pet. App. A-6; 632 F.2d 945, 947.

The testimony of two witnesses who were subject to cross-examination, and who

each spent a morning with Amy, was clearly and unequivocally to the contrary. J.A. 42, 267-268. They were not cross-examined. There is no testimony in the record for the court's conclusion.

Judge Broderick and the majority of the court of appeals held that Amy did not understand almost 41% of what transpired in her class. They based that determination on general propositions purportedly applicable to all deaf children, and upon affidavits deliberately shielded from cross-examination by the respondents. They ignored uncontradicted testimony on Amy's understanding, and on her academic and social success. Their findings were clearly erroneous and should be reversed.

4. The district court improperly granted injunctive relief extending beyond the school year covered by the individualized education program for which respondents sought judicial review.

Subsection (a)(11) of §1413 (State Plans) requires that a state plan

> provide for procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of handicapped children (including evaluation of individualized education programs), in accordance with such criteria that the Commissioner shall prescribe pursuant to §1417 of [the Act].

The annual review triggers the parents' right to challenge any determination made at such annual review pursuant to §1415 (b)(2).

Under the Act, Congress has made the right to bring an action in state or federal court explicitly contingent on the exhaustion of administrative remedies. Akers v. Bolton, ___ F.Supp.___, 3 EHLR 553:225, 234 (D. Kan. 1981).

Under the rules of the New York

Commissioner of Education for appealing the decision of the committee on the handicapped to an independent hearing officer (8 N.Y.C.R.R. §200.5), and for appealing that decision to the Commissioner of Education (8 N.Y.C.R.R. §279), the process can be completed within 95 days, assuming the appellant files on the first available date, and respondent on the last. The maximum time to complete the process is 135 days.

The New York State plan, submitted to and approved by the Secretary, then provides for judicial review of the Commissioner's final determination by means of an Article 78 proceeding (N.Y. C.P.L.R. §7800 et seq. (McKinney's)), which can be brought as soon as the final administrative decision has been received. Under the Act, a party may opt for an immediate appeal to a federal court, the path chosen here.

The 1978-79 school year expired on June 30, 1979, making respondents' appeal moot for that year. The respondents were responsible for the delay in bringing the matter to court. They delayed the impartial hearing for two months in order to submit an additional affidavit, and they waited four months after filing the federal action to move for injunctive relief. See petitioner's main brief, footnotes 2 (p. 10) and 7 (p. 15) for the chronology of events.

The school district's Committee on the Handicapped determined the program for the 1979-80 school year, with no change, prior to August 17, the return date for the motion for a preliminary injunction. If the respondents had pursued their administrative remedies for the 1979-80 school year in an expeditious fashion, they could have appealed to a court by early November.

While the conduct of the petitioners was capable of repetition, it was not capable of evading effective review, except through the inaction of the party seeking that review. The subject matter is not inherently incapable of evading review, and thus does not fall within the exception to the mootness rule. Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498, 515 (1911) The district court should have dismissed the case upon the Commissioner's motion. Indianapolis School Commissioners v. Jacobs, 420 U.S. 128 (1975).

CONCLUSION

The New York State plan, which was approved by the Secretary of Education under the Act, does not mandate provision of sign language interpreters for deaf children, and the school district personnel determined that Amy Rowley's unique individual needs do not require one. Respondents' complaint should have been dismissed on that basis. The district court formulated an unnecessary and unworkable definition of free appropriate public education. In spite of the evidence presented by petitioners' witnesses, it erroneously found that Amy Rowley required an interpreter in her mainstream classroom, and ordered provision of interpretive services for the 1979-1980 school year, prior to state administrative review of that year's I.E.P. The Court of Appeals

for the Second Circuit upheld this determination. Its decision was clearly erroneous.

Petitioners respectfully request that this Court reverse the judgment of the Court of Appeals and dismiss the complaint.

March 15, 1981

Respectfully submitted,

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No. 80-1002

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Petitioners,

—v.—

AMY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY in their own right,

Respondents.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION, AS *AMICUS CURIAE*

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INTEREST OF AMICI*

The American Civil Liberties Union is a nationwide non-partisan organization of over 250,000 members, dedicated to defending the principles embodied in the Bill of Rights.

The ACLU and its affiliates have a deep and continuing interest in protecting the constitutional and statutory rights of handicapped individuals, including rights secured by the Rehabilitation Act of 1973, 27 U.S.C. 790, and the Education of the Handicapped Act, 20 U.S.C. §§ 1401, 1411 et seq. In the belief that judicial involvement is necessary to secure the rights of handicapped individuals, the ACLU has represented the plaintiffs in O'Connor v. Donaldson, 422 U.S. 563 (1975), the Willowbrook case, NYSARC v. Carey, 393 F. Supp.

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* The parties have consented to the filing of this brief. Letter so indicating have been lodged with the Clerk.

715 (E.D.N.Y. 1975) and petitioner in Trageser v. Libbie Convalescent Home, cert. denied 442 U.S. 947 (1979). The ACLU appeared amicus curiae in Southeastern Community College v. Davis, 442 U.S. 397 (1979) and University of Texas v. Camenisch, 68 L.Ed. 2d 175 (1981).

Because this case raises important questions concerning the protection of rights expressly secured by Congress through the Education of the Handicapped Act, the ACLU has a strong interest in participating as amicus.

STATEMENT OF THE CASE

This case involves the sufficiency under federal law of the education program provided to Amy Rowley, a deaf child enrolled in a public school in the Hendrick Hudson Central School District in the State of New York. Amy Rowley and her

parents, respondents, object to the school district's failure to provide a sign-language interpreter as part of her educational program. The Rowleys assert that the school district is bound by the Education of the Handicapped Act, 20 U.S.C. §§ 1401, 1411 et seq., under which the State of New York receives federal funds. That Act requires each recipient state to guarantee a "free appropriate public education" for all school-aged children in the state. 20 U.S.C. § 1412(1).

Under the Act, a recipient state must submit to the federal government a statewide plan for fulfilling the Act's requirements, 20 U.S.C. § 1413, and must assure that local educational agencies annually identify, evaluate, and plan for the unique educational needs of each handicapped child, 20 U.S.C. § 1414(a)(5). This preparation of an "individualized

education program" (IEP) for each handicapped child must be subject to parental participation, 20 U.S.C. §§ 1401(19), 1415 (b), and to review by impartial due process hearings at the local and/or state levels, 20 U.S.C. § 1415(b)(2), (c).

Respondents unsuccessfully pursued each of these administrative avenues seeking modification of Amy Rowley's IEP for the 1978-1979 school year. Respondents then initiated this suit in the United States District Court for the District of New York as authorized by 20 U.S.C. § 1415(e)(2). That provision accords a right to federal court review of a complaint lodged under the Act. The District Court made a factual finding that Amy Rowley was able to identify only 59% of the words spoken to her when she relied on a hearing aid and lipreading, but use of a sign-language interpreter allowed

her to identify 100% of the words spoken to her. 483 F. Supp. 528, 532 (S.D.N.Y. 1980). The court concluded that the services of an interpreter are necessary to assure Amy Rowley an appropriate education. The district court awarded prospective relief to this effect under 20 U.S.C. § 1415(e)(2), which authorized judicial "grant of such relief as the Court determines is appropriate." The Court of Appeals for the Second Circuit affirmed.

SUMMARY OF ARGUMENT

The express terms of the Education of the Handicapped Act require that funds be made available under the Act only to states which have agreed to develop individualized educational programs for each handicapped child, to provide impartial administrative procedure challenges to those individualized pro-

grams, and to submit to judicial review such challenges unresolved by the administrative process. 20 U.S.C. §§ 1412(2)(2), 1415. The courts below thus had the authority to review the individualized education program (IEP) proposed for respondent Amy Rowley. Specifically, the courts had authority to determine, on a preponderance of the evidence, whether that IEP assured Amy Rowley "a free appropriate public education," 20 U.S.C. § 1412(1) and (2)(B), and the courts also had authority to award such relief determined appropriate. 20 U.S.C. § 1415(e).

The courts below properly interpreted the right to a "free appropriate public education" as a right of equal opportunity. The Act directs recipient states to guarantee the right through specialized instruction and related services designed to minimize the effect of handicapping conditions.

This means more than an "adequate" education and more than mere training for self-sufficiency. It means education designed to put the handicapped child as much as possible on an equal footing with non-handicapped children, thereby permitting the handicapped child to take advantage of the instructional program.

ARGUMENT

I. THE EDUCATION OF THE HANDICAPPED ACT MAY BE ENFORCED BY INDIVIDUAL FEDERAL SUITS.

There can be no doubt that Congress contemplated and authorized judicial consideration and relief in a case like this one. The Education of the Handicapped Act, as amended, specifically provides that

> any party aggrieved by the findings and decision [of the local and state-level educational agencies regarding a child's educational placement] shall have

> the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. 20 U.S.C. § 1415(e)(2).

In addition to creating this individual cause of action, Congress expressly prescribed independent judicial review of the substance of the challenged educational placement, not judicial deference to the school district's decision. For Congress directed that in any suit brought under 20 U.S.C. § 1415(e)(2), "the court shall receive the records of the administrative proceedings, [and] shall hear additional evidence at the request of a party," Id.[1/] This directive contrasts

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1/ 20 U.S.C. § 1415 (e)(2) does call for exhaustion of administrative procedures prior to initiation of judicial action. (footnote continued on following page)

sharply with the scope of judicial review of most administrative decisions, for which

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(footnote continued from preceding page) Respondents fully exhausted the local and state procedures without successfully obtaining a sign-language interpreter as part of Amy Rowley's individualized education program for 1978-1979. The courts below properly ordered relief extending beyond that school year, for Congress authorized the reviewing court to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). Moreover, if the Rowleys were required to return to the local school agency to challenge the same claimed defect in the 1979-1980 program, the exhaustion requirement would turn into an empty exercise, and the school year at issue would again elapse before judicial review. As in other contexts, exhaustion is not required under the Education of the Handicapped Act where "resorting to state procedures clearly would be futile." See Armstrong v. Kline, 476 F. Supp. 583, 602 (E.D.Pa. 1979), remanded on other grounds sub nom. Battle v. Pennsylvania, 629 F.2d 269 (3d Cir. 1980), cert. denied sub nom. Scanlon v. Battle, No. 80-827 (June 22, 1981); 121 Cong. Rec. 37416 (1975)(Senator Williams). See generally Southern Pacific Terminal Co. v. I.C.C., 219 U.S.C. 498, 515 (1911) (jurisdiction appropriate where issue "capable of repetition, yet evading review").

the courts typically are constrained to determine whether the administrative decision is substantially supported by evidence received by the agency, and for which the court may not substitute its judgment for the agency's decision. See, e.g., Consolo v. Federal Maritime Commission, 383 U.S. 607, 620 (1966). Congress considered but rejected a "substantial evidence" standard of judicial review for claims brought under the Education of the Handicapped Act, S. Rep. No. 455, 94th Cong., 1st Sess., 47-50 (1975), reprinted in [1975] U.S. Code Cong. & Ad. News 1480, 1500-02, and instead authorized the reviewing court to "bas[e] its decision on the preponderance of the evidence," 20 U.S.C. § 1415(e)(2). Finally, Congress plainly intended the reviewing court to examine the correctness of the challenged educational plan because it authorized review of not only procedural

shortcomings but also "the findings and decisions" of the educational agency, § 1415(e)(2), and because Congress empowered the reviewing court to "grant such relief as the court determines is appropriate," id. See S. Rep. No. 94-455, 94th Cong., 1st Sess., 50, reprinted in [1975] U.S. Code Cong. & Ad. News 1503 ("the court . . . shall grant all appropriate relief").2/

The backdrop of extensive judicial involvement undoubtedly contributed to this congressional grant of broad remedial power and judicial authority to review evidence adduced by both the educational

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2/ This judicial review of individual complaints exists independently of the judicial power to review federal administrative decisions terminating state funds under the Act. Compare 20 U.S.C. § 1415(e)(2) with 20 U.S.C. §1416(b).

agencies and the court. See S. Rep. No. 168, 94th Cong., 1st Sess., 5-8, reprinted in [1975] U.S. Code Cong. & Ad. News 1429-1432. The Senate Report expressly acknowledged that "more than 36 court cases in the States have recognized the rights of handicapped children to an appropriate education," id., at 1431. Congress concluded that the States were unable to comply with the judicial mandate without federal assistance, and therefore Congress would provide that assistance. Id., at 1429, 1431. In so doing, Congress committed itself to the standards announced by such decisions as Pennsylvania Ass'n for Retarded Children v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D.Pa. 1972), cited in S. Rep. No. 168, 94th Cong., 1st Sess., 6, reprinted in [1975] U.S. Code

Cong. & Ad. News 1430.[3/] Congress concluded that parents across the country should no longer have to turn to courts to assure an appropriate education for their handicapped children, see id., 1433, and therefore

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3/ This case does not present the question whether the cases relied upon by Congress were correctly decided, for Congress independently endorsed the right to an appropriate education for all handicapped children. See, e.g., S. Rep. No. 168, 94th Cong., 1st Sess., 8, reprinted in [1975] U.S. Code Cong. & Ad. News 1432 ("The Education Amendments of 1974 incorporated the major principles of the right to education cases"); id., at 1433 ("It is this Committee's belief that the Congress must take a more active role under its responsibility to equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity.") Cf. Lau v. Nichols, 414 U.S. 563 (1974)(equal protection claim need not be reached where statute implementing Congressional equality initiative also at issue).

Congress established an administrative scheme. At the same time, Congress preserved a judicial role for ultimate enforcement of the right to an appropriate education. 20 U.S.C. § 1415(e)(2). Thus, the federal courts have properly construed the Education of the Handicapped Act to empower a reviewing court "to determine whether the placement decision was correct," Monahan v. Nebraska, 491 F. Supp. 1074, 1086 (D.Neb. 1980), and to review the decision about "what constitutes an appropriate education for a handicapped person," Bosall v. Sequoia U. High School District, 464 F. Supp. 1104, 1112 (N.D. Cal. 1979). See Note, Enforcing the Right to an Appropriate Education: The Education for All Handicapped Children Act of 1975, 92 Harv.L.Rev. 1103, 1125-27 (1979).

Judicial review of the placement decision offers a guard against the abdication

of responsibility for handicapped children that can result from purely administrative treatment. Judicial enforcement of the Education of the Handicapped Act in North v. District of Columbia Bd. of Education, 471 F. Supp. 136 (D.D.C. 1979), assured an educational placement for a child who had previously been subject to bureaucratic conflicts between the local Board of Education and Department of Human Resources. Cf. Sherry v. N.Y. State Education Dept., 479 F. Supp. 1328 (W.D.N.Y. 1979)(education department may not suspend handicapped student to avoid duty to provide appropriate education under Rehabilitation Act of 1973, 29 U.S.C. § 794). Further, judicial review of the placement decision under the Act may be essential where a state educational system callously manipulates regulatory language to avoid the duties accepted with funds received from the

Federal Government. This is surely the case where, as here, the state irresponsibly argues that a concededly deaf child is not "handicapped" under the Act simply because her educational performance did not appear below the class average. See Brief for Defendant-Appellant, in the Court of Appeals for the Second Circuit, at 25-26.

The judicial enforcement set up by the Act constitutes a significantly different statutory scheme than other federal funding statutes. Unlike the Devlopmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6000 et seq., at issue in Pennhurst State School & Hospital v. Halderman, 101 S. Ct. 1531 (1981), the Education of the Handicapped Act expressly specifies a private cause of action for individual judicial enforcement. See 20 U.S.C.

§ 1415(e). In addition, where the Developmentally Disabled Act registered a federal preference for certain kinds of treatment, encouraged through funding incentives, 101 S. Ct. at 1542, 1547, the Education of the Handicapped Act makes federal monies available only to a state able to demonstrate that it "has in effect a policy that assures all handicapped children the right to a free appropriate public education" 20 U.S.C. § 1421(1), (2)(B), (2)(C)(eligibility requirements), 45 CFR 121a.121. Further, any state receiving federal funds under the Act must accept the procedural rights of parents and children in the educational placement decisions as detailed by the body of the Act. See 20 U.S.C. §§ 1412 (5), 1415.

Thus the express terms of the Act, not any precatory language, require that

funds be made available under the Act only to states which have agreed to develop individualized educational programs on an annual basis, to provide impartial administrative procedures for hearing challenges to those individualized programs, and to submit to judicial review when the correctness of an individual placement is challenged. These statutory elements also contrast with the Rehabilitation Act of 1973, which forbids states discrimination on the basis of handicap but merely encourages states' adoption of affirmative action policies. See Southeastern Community College v. Davis, 442 U.S. 397, 410 (1979).

Here petitioners, through the State of New York, agreed to guarantee a free appropriate public education to all handicapped children within its juris-

diction, and the State accepted federal funds for this end subject to the express statutory provision granting a cause of action for individual complaints and authorizing such relief deemed appropriate by the reviewing court. The State Commissioner of Education and the local school district cannot now restrain the Rowleys from obtaining the statutorily-mandated individualized judicial review of the correctness of Amy Rowley's educational placement.

Nor may petitioners successfully assert that the sole question on review is whether the individualized education plan conforms to the state-wide plan approved by the Federal government prior to the award of funds under the Act. This interpretation of the scope of judicial review contradicts the legislative commitment to individualized determinations of appropriate treatment plans,

and substantive judicial review of those determinations. See Point II, infra. Independent of the state-wide plan, see 20 U.S.C. §§ 1412(2), 1413, is the state's commitment to "a policy that assures all handicapped children the right to a free appropriate public education," 20 U.S.C. § 1412 (1). See also 20 U.S.C. § 1412(2)(B)(requiring State policies and procedures to "assure" a "free appropriate public education"); 20 U.S.C. § 1401(18)("free appropriate public education" constituted by special education and related services).

The courts below had the authority to review the 1978-1979 individualized education program proposed for Amy Rowley and to order the relief determined to be appropriate, 20 U.S.C. § 1415(e)(2).

II. THE RIGHT TO A "FREE, APPROPRIATE, PUBLIC EDUCATION" IS A RIGHT TO INDIVIDUALIZED SERVICES MINIMIZING THE EFFECT OF HANDICAPPING CONDITIONS, NOT MERELY A RIGHT TO "ADEQUATE" EDUCATION.

The courts below correctly refused to translate the statutory requirement of a "free appropriate public education," 20 U.S.C. § 1412(1) into either more or less than Congress intended. Congress did not call for a merely "adequate" education for handicapped children, although petitioners have suggested this standard. Nor did Congress require states to maximize the educational acheivements of handicapped children served by funds obtained under the Education of the Handicapped Act. Instead, Congress demanded that recipient states assure an "appropriate" education for each handicapped child.

As the entire statutory scheme, legislative history, and dictionary definition of "appropriate" make clear, an "appro-

priate" education is one especially suited to the unique needs of the particular child.[4/] The Act's central requirements are annual evaluation of and planning for each individual child; an individualized educational program must be developed each year to specify the special educational instruction and related services designed to respond to the child's particular needs, 20 U.S.C. §§ 1401(16), (17), (18), 1414(a)(5). This legislative commitment to tailoring educational services to fit the unique needs of each child is underscored by

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4/ The Education of the Handicapped Act specifies other elements of "free, appropriate, public education" that are not particularly relevant to this case, but may be important in reviewing other challenged educational placements. See, e.g., 20 U.S.C. §§ 1412(5)(B), 1414(a)(1)(C)(iv) (least restrictive placement); 20 U.S.C. § 1412(5)(B)(continuum of placement options).

the Act's procedural protections of parental involvement, 20 U.S.C. §§ 1401(19), 1415(b)(1), and opportunities for individualized administrative and judicial review, 20 U.S.C. § 1415.

Moreover, Congress required not only specially-designed instruction, 20 U.S.C. §§ 1401(1a), 1414(2)(c), but also "related services," 20 U.S.C. § 1412(C).[5/] The Sen-

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5/ "The term 'related services' means transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a handicapped child to benefit from special education, and includes the early identification of handicapping conditions in children," 20 U.S.C. § 1401(17).

The Act's definition of "related services" specifies services "including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services." Id. The fact that sign-language interpretation is not mentioned in this list hardly bars its inclusion in an individualized education program or in relief ordered by a court. "Include" here carries its usual meaning: "to take in or comprise as part of a larger aggregate." Webster's Seventh New Collegiate Dictionary. Accord

(footnote continued on following page)

ate reports explained that "'related services' . . . include[s] early identification and assessment of handicapping conditions and the provision of services to minimize the effects of such conditions." Senate Rep. No. 94-168, [p. 12](1975)(emphasis added).

As this passage demonstrates, Congress intended educational and related services that would put handicapped children as much as possible on an equal footing with non-handicapped children. Congress directed participating states to provide services related to education that minimize the disadvantaging effects of handicaps in the educational process and permit the handi-

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(footnote continued from preceding page) 45 CFR 121a.6 ("include" as used in regulations interpreting the Education of the Handicapped Act "means that the items named are not all of the possible items that are covered, whether like or unlike the ones named.")

capped to take advantage of the instructional program. See 45 CFR 121a.14 (comment).[6/]

Special instruction and related assistance tailored to the child's needs are the

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6/ It was undoubtedly in this vein that the courts below sought to define "appropriate" education by comparing handicapped and nonhandicapped children. Judge Mansfield's dissent, however, mistakenly emphasized educational achievement for this comparative purpose, 632 F. 2d 945, 953 (1981). The District Court's formulation, endorsed by the majority in the Court of Appeals, more accurately reflects the concept of equal opportunity embodied in the Act. The District Court's formulation was also flawed, however; comparison of the shortfall between educational potential and achievement for the handicapped child with the analogous shortfall for the nonhandicapped could introduce perplexing methodological problems and unnecessary factfinding burdens. A more workable standard would ask whether the educational program is designed to minimize the effect of the handicap.

natural consequences of the dictionary meaning of "appropriate". Webster's Seventh New Collegiate Dictionary defines "appropriate" as "especially suitable or compatible; fitting." By selecting the word "appropriate," Congress meant education suitably responsive to the particular handicapping characteristics of each child.

Judge Mansfield's dissent below erroneously suggests that an "appropriate" education for the handicapped is one responding to society's needs rather than to the individual child's characteristics. The dissent construed the Act to require an education "that would enable the [handicapped] child to be as free as reasonably possible from dependency on others, [and] would enable the child to become a productive member of society." 632 F.2d, at 953. See id., at 952 ("the aim of the Act is to develop a handi-

capped child's self-sufficiency"). These may be important goals for all children and, to that extent, these goals may contribute to definitions of the rights of the handicapped. But as used by Judge Mansfield, the goals justify denying Amy Rowley services necessary for her to identify more than 59% of the words spoken to her in the classroom. This result conflicts with the Act's commitment to minimizing the effect of the handicaps in the educational process. Rather than establishing different educational goals or programs for the handicapped, the Education of the Handicapped Act specifies that a "'free appropriate public education' means special education and related services which . . . (C) include an appropriate pre-school, elementary, or secondary school education in the state involved." 20 U.S.C. § 1401(18);

45 CFR 121a.4. Accordingly, an "appropriate" education for a handicapped child involves more than training for self-sufficiency; it involves an opportunity to learn what nonhandicapped students learn.7/

Here, there is no reason to doubt that the child has the ability to learn regular classroom material--if she is given the chance. The District Court found as a factual matter that Amy Rowley has high intelligence and eagerness, 483 F. Supp., at 534-35. At the same time, the court found that, without a sign-language inter-

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7/ Of course, the nature of an "appropriate" education for some handicapped children may of necessity depart significantly from the educational program for nonhandicapped children, especially where the handicap is severe mental deficiency. In those situations, an education tailored to minimize the effects of the handicap may well be a special program aimed to promote self-sufficiency.

preter, Amy "is capable of discriminating considerably less than 100% of what is spoken in class--probably in the neighborhood of 59%." Id., at 532. It is as if a class using five textbooks gave a blind student only three of them in braille or tape cassettes; the remaining instructional material is simply inaccessible to the handicapped child. Amy Rowley too was given just three-fifths of the regular educational program. In this light, the District Court certainly did not err in finding, by a preponderance of the evidence, that Amy Rowley required further educational assistance. See 20 U.S.C. § 1415(e)(2). Without further assistance, the school's educational program failed to minimize the disadvantaging effect of Amy Rowley's handicap.

As the District Court determined, "Amy's lack of understanding . . . is inherent in

her handicap and is precisely the kind of deficiency which the Act addresses." Id., at 535. This Court should not disturb that finding.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1981

BOARD OF EDUCATION OF HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY *et al.*,
Petitioners,

v.

AMY ROWLEY *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR THE ASSOCIATION FOR RETARDED CITIZENS OF THE UNITED STATES, EPILEPSY FOUNDATION OF AMERICA, NATIONAL MENTAL HEALTH ASSOCIATION AND NSAC, THE NATIONAL SOCIETY FOR CHILDREN AND ADULTS WITH AUTISM, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF FOR THE ASSOCIATION FOR RETARDED CITIZENS OF THE UNITED STATES, EPILEPSY FOUNDATION OF AMERICA, NATIONAL MENTAL HEALTH ASSOCIATION AND NSAC, THE NATIONAL SOCIETY FOR CHILDREN AND ADULTS WITH AUTISM, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*

Amici curiae are four organizations of parents of handicapped children, disabled adults, citizens, professionals and advocates who are concerned that children with a wide variety of handicapping conditions receive

educational services which are appropriate to meet their special needs.[1]

Amici are directly familiar with the effect on handicapped children and on their families of the lack of the appropriate educational services that are needed to enable a child to learn to participate fully as an adult member of this society. In the absence of these services, *amici* believe that society will waste the valuable talents and skills of handicapped children and will be burdened with the unnecessary expense of supporting their continued dependency as adults.

Many of the *amici* organizations actively participated in the congressional hearings preceding the enactment of the Education for All Handicapped Children Act of 1975 (PL 94-142), 20 U.S.C. §§ 1401-1420 (1976), and all have been involved in the implementation of the Act's provisions. They share a common concern that the flexible and individualized approach to the education of

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[1] *Amici* include:

(1) The Association for Retarded Citizens of the United States, a voluntary organization of 300,000 members devoted to promoting the welfare of mentally retarded children and adults;

(2) the Epilepsy Foundation of America, an organization of 12,000 members established to advance the interests of persons with epilepsy and, *inter alia*, to ensure that children with epilepsy are permitted to participate fully in educational programs;

(3) the National Mental Health Association, a citizens' organization of one million lay and professional members whose primary purpose is to encourage efforts to provide better educational and other services for mentally ill children and adults; and

(4) NSAC, The National Society for Children and Adults with Autism, a national organization of 6,000 parents, citizens and professionals dedicated to the education and welfare of children and adults with severe disorders of communication and behavior.

handicapped children which was adopted by the Congress be maintained.

Amici have received consent to file this brief from both petitioners and respondents. Their letters of consent are being filed with the Clerk of this Court.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The only issue properly before this Court is whether, based on the unique facts of this case, the district court properly determined that a sign-language interpreter was necessary to provide respondent with a "free appropriate public education" under the Education for All Handicapped Children Act (PL 94-142), 20 U.S.C. §§ 1401-1420 (1976). This Court should not attempt to redefine a standard carefully crafted by Congress as a condition for the receipt of federal funds by those states choosing to participate in the program. In addition, petitioners' arguments stemming from their reading of *Halderman v. Pennhurst State School & Hospital*, 451 U.S. 1 (1981), are not properly before the Court because they were not raised at either level below.

As a condition for receipt of funds under the Act, Congress promulgated several basic requirements. First, states must provide broad services to meet the needs of individual children, including sign-language interpreters when appropriate for a particular child. Second, Congress articulated a flexible and workable standard for decisionmakers. Congress did not intend decisionmakers to narrow this standard (*i.e.*, an educational program appropriate to meet the unique needs of the handicapped child) in order to create from the unique facts of an individual case a single, inflexible goal. Finally, in those extremely rare instances when disputes are not resolved through the Act's local and state administrative procedures, Congress vested final authority with state and federal courts to take evidence and determine what is an appropriate education for an individual child. The mandate for services,

the substantive standard and the procedural safeguards were based upon a detailed hearing record and findings by the Congress as to both previous state neglect of these children and the substantial economic benefit to society of properly educating handicapped children.

Based on the particular record and findings of fact in this case, the district court's ruling that a sign-language interpreter was necessary for respondent to receive an appropriate education under the Act was not clearly erroneous.

ARGUMENT

I. THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT REQUIRES PARTICIPATING STATES TO PROVIDE AN INDIVIDUALIZED AND APPROPRIATE EDUCATIONAL PROGRAM TO ALL HANDICAPPED CHILDREN.

The Education for All Handicapped Children Act of 1975 (PL 94-142), 20 U.S.C. §§ 1401-1420 (1976), is designed to ensure, through a combination of federal financial assistance and detailed conditions, that states provide handicapped children an education appropriate to their individual needs. States have the choice of voluntarily participating in this $1 billion program. If they choose to participate, they must then assume full responsibility for providing programs and services sufficient to meet the special educational needs of all handicapped children residing in the state, regardless of intellectual ability or severity of handicapping condition.

Congress enacted this ambitious program after years of deliberation and fact-finding about the states' denial of necessary services to handicapped children and the harms to children and costs to society that flowed from this denial. The historical context and the statutory language leave no doubt that Congress intended to require states accepting federal financial assistance under

the Act to provide programs and services sufficient to meet children's individual needs.

A. Background and History of the Act.

PL 94-142 was the culmination of nearly ten years of legislation. In response to states' widespread failure to provide public education to millions of children, Congress had progressively increased federal responsibility to guarantee appropriate educational services to the nation's handicapped children.[2]

Federal involvement in education for handicapped children began in 1966. Congressional hearings revealed that fully two-thirds of the nation's handicapped children were either totally excluded from school or were sitting idly in regular classrooms, their special needs largely ignored. House Report, *supra* note 2, at 2. On the basis of these findings, Congress established a program of grants to the states to encourage both development of new special education programs for handicapped children and improvement of existing services. *Id.* Four years later, in 1970, this program was expanded and federal funding for special education was increased. *Id.*; Senate Report, *supra* note 2, at 5.

Congressional concern was heightened between 1971 and 1973 by a series of court cases filed by handicapped children and their parents, seeking to establish a right to equal educational opportunity. House Report, *supra* note 2, at 3-4, 7; Senate Report, *supra* note 2, at 6-8. The findings of the courts demonstrated that wholesale exclusion of handicapped children from schools and neglect of those in school remained a serious national problem. *Id.*

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[2] H.R. Rep. No. 332, 94th Cong., 1st Sess. 2-7 (1975), [hereinafter "House Report"]; S. Rep. No. 168, 94th Cong., 1st Sess. 5-8 (1975), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS, 1425, 1429-32 [hereinafter "Senate Report"]; 121 Cong. Rec. 19502-3 (1975) (Sen. Cranston); 121 Cong. Rec. 19482 (1975) (Sen. Randolph); 121 Cong. Rec. 19485 (1975) (Sen. Williams).

Early in 1973, Congress began nearly a year and a half of hearings.[3] More than 200 witnesses testified about the harm being done both to handicapped children and to society by the states' failure to provide these children an appropriate education.[4] These witnesses included parents, teachers, school principals and superintendents, school board members, state and local officials, special education experts and other professionals expert in the care and education of handicapped children. Senate Report, *supra* note 2, at 7; House Report, *supra* note 2, at 5-6. They testified about large numbers of children denied many critical services.

The testimony described the educational neglect of children with all types of handicapping conditions, both severe and mild.[5] It revealed that none of the states in which hearings were held was providing the broad range of services required to meet the varied needs of these handicapped children. 121 Cong. Rec. 19487-91 (1975) (Table 3; Status of State Education Programs for Hand-

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[3] In 1974, Congress extended funding for special education on an interim basis, pending completion of the hearings. At the same time, Congress imposed specific protections for handicapped children on the states as a condition for receiving federal funds. Among the provisions included in the Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484 (1974), were requirements that states accepting these federal funds identify unserved handicapped children, integrate them and their programs into normal school programs as much as possible and establish basic due process procedures to protect their rights. House Report, *supra* note 2, at 4-5; Senate Report, *supra* note 2, at 3, 5-6, 8.

[4] *Education for All Handicapped Children, 1973-74: Hearings on S.6 Before the Subcommittee on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess. (1973-74) [hereinafter "Senate Hearings"]; House Report, *supra* note 2, at 5-6.

[5] *See, e.g.*, Senate Hearings, *supra* note 4, at 399 (orthopedically handicapped); 833 (speech impaired and deaf); 796 (hard of hearing); 1213 (emotionally disturbed); 403-11 (mentally retarded); 805, 807 (learning disabled); 812 (cerebral palsy); 394, 397, 793 (autistic).

icapped Children). Hearings were held in a number of states that had enacted state laws establishing a right to education for handicapped children. Yet even in these states, the testimony showed that substantial numbers of handicapped children continued to be denied appropriate services.[6] Some children were placed on waiting lists, some children were excluded from school completely because services were unavailable and still others were placed in existing programs with little regard for their special individual needs. *See, e.g.*, Senate Hearings, *supra* note 4, at 25, 43, 48, 389, 459.

Extensive testimony of both parents and educators focused on the wide range of services needed to educate appropriately these special children. The service needs discussed in the hearings included, *inter alia*, specialized diagnostic and evaluation services, speech therapy and communication-skills training, sign-language interpretation, vocational training, specialized tutoring programs, behavior-modification programs, psychological counseling, self-help and self-care skills training programs and specially equipped resource rooms.[7]

National statistics prepared by the Office of Education at the request of Congress revealed that the numbers of children excluded from school or denied appropriate services continued to be substantial. Senate Report, *supra* note 2, at 8; House Report, *supra* note 2, at 11-12. Figures ultimately adopted as congressional findings estimated that more than one million handicapped children were

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[6] For example, in New Jersey, Senator Williams noted that "only 43 percent of all children who should be served currently are being served in our State." Senate Hearings, *supra* note 4, at 21 (introductory remarks of Sen. Williams). Similarly, in Massachusetts, despite a progressive state law, approximately 100,000 Massachusetts children were excluded from school at the time of the hearings. *Id.*, at 346 (testimony of David Bartley, Speaker, Massachusetts House of Representatives).

[7] Senate Hearings, *supra* note 4, at 45, 87, 448, 790, 797, 809, 813, 833, 1212.

excluded entirely from public school and more than half of the estimated eight million handicapped children in the United States were not receiving appropriate services.[8] All categories of handicapping conditions and all age groups were affected. Senate Report, *supra* note 2, at 8; House Report, *supra* note 2, at 11-12. For example, the Office of Education estimated that 29 percent of deaf and 82 percent of hard-of-hearing children were unserved. *Id.* Figures for other categories of handicapping conditions varied from a low of 17 percent of mentally retarded children to a high of 88 percent of learning disabled children unserved. *Id.*

Congress found that this failure to appropriately educate handicapped children harmed both the children and their families and, furthermore, resulted in substantial costs to society.[9] Children were denied "the chance to develop their abilities as individuals and to reach out with their peers for their own personal goals and dreams."[10] Parents' and brothers' and sisters' lives were often profoundly disrupted by the unending burden of caring for the uneducated handicapped child. Moreover, Congress found equally great costs to society. Children capable of becoming taxpaying members of society instead became permanently dependent on the taxpayers. Thousands of the more severely handicapped were forced into public institutions when their families could no longer care for them. Finally, society lost the benefit of the

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[8] Pub. L. No. 94-142, § 3(a), 89 Stat. 773 (1976) (reprinted in notes to 20 U.S.C. § 1401).

[9] Senate Report, *supra* note 2, at 9; House Report, *supra* note 2, at 11, 24; 121 Cong. Rec. 19482 (1975) (Sen. Randolph); 121 Cong. Rec. 19492 (1975) (Sen. Williams); 121 Cong. Rec. 37411 (1975) (Sen. Humphrey); 121 Cong. Rec. 25541 (1975) (Rep. Harkin).

[10] Senate Hearings, *supra* note 2, at 341 (Sen. Kennedy). *See also* 121 Cong. Rec. 19496 (1975) (Sen. Kennedy) ("Children who do not receive the training and educational opportunities necessary for their full development as human beings often lead unhappy lives working in jobs far below their capabilities.").

contribution the children could have made if provided an appropriate education.[11]

B. Congress Conditioned Receipt of Funds on Provision of a Broad Range of Services to Handicapped Children Regardless of the Severity of Their Handicapping Conditions.

Based upon the voluminous record before it, including the advice of special education experts and school officials, Congress enacted PL 94-142. It conditioned receipt of funds under the Act upon the commitment of state and local educational agencies to provide each handicapped child special education and related services designed to meet the unique needs of the child, notwithstanding the nature and severity of the child's handicapping condition. As an incentive for states to accept these conditions and serve handicapped children, Congress increased sevenfold the funds available to provide services under the Act—from less than $150 million in 1974 to more than $1 billion in 1980.[12] And in recognition of the substantial changes in service delivery patterns required by the Act, states were given years of lead time to allow them to plan and develop the additional services required. 20 U.S.C. § 1412(2)(B); House Report, *supra* note 2, at 13, 15; Senate Report, *supra* note 2, at 18. Every state except New Mexico chose to participate in the program and accept its conditions.[13]

Congress' purpose and intent and the mandated conditions for states' participation are clear, beginning with

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[11] 121 Cong. Rec. 19505 (1975) (Sen. Beall); 121 Cong. Rec. 19494 (1975) (Sen. Javits).

[12] The Budget of the United States Government: Fiscal Year 1976 at 420 and Fiscal Year 1982 at I-I 6-7, U.S. Government Printing Office, 1975 and 1981, respectively.

[13] State Program Implementation Studies Branch, Office of Special Education, U.S. Department of Education, *Second Annual Report to Congress on the Implementation of Public Law 94-142: The Education for All Handicapped Children Act* 26-27 (1980).

the Act's preamble and continuing through each of its provisions. The Declaration of Purpose, for example, states that the Act is designed to "assure that all handicapped children have available to them, within the time periods specified . . ., a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, [and] to assure that the rights of handicapped children and their parents or guardians are protected." [14]

The statute explicitly provides that "the following conditions" must be met by a state in order to qualify for assistance:

1. The state must have in effect a policy assuring "all handicapped children the right to a free appropriate public education." 20 U.S.C. § 1412(1).

2. The state must establish detailed policies and procedures to assure that "a free appropriate public education will be available for all handicapped children between the ages of three and eighteen . . . not later than September 1, 1978, and . . . between the ages of three and twenty-one . . . not later than September 1, 1980." 20 U.S.C. § 1412(2)(B).[15]

3. Each local educational agency in the state must establish and annually review and revise an "individualized education program for each handicapped child." 20 U.S.C. §§ 1412(4) and 1414(a)(5).

Finally, each of the Act's operational terms (including, *inter alia*, free appropriate public education, special education, related services and individualized education program) is defined with particularity. 20 U.S.C. § 1401.

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[14] Pub. L. No. 94-142, § 3(a), 89 Stat. 773 (1976) (reprinted in notes to 20 U.S.C. § 1401).

[15] A limited exception is allowed for children ages 3 to 5 and 18 to 21 if serving such children is inconsistent with state law or a court order. 20 U.S.C. § 1412(2)(B).

II. THE ACT'S STANDARD OF "APPROPRIATE EDUCATION" DOES NOT REQUIRE FURTHER ELABORATION AND CONGRESS DID NOT INTEND IT TO MEAN SELF-SUFFICIENCY OR ANY OTHER SINGLE GOAL.

The cornerstone of the Act is the requirement that all state and local education agencies provide each handicapped child with a "free appropriate public education," 20 U.S.C. §§ 1412(1), 1414(a)(1)(C)(ii), including, *inter alia*, a program of "special education" and "related services," 20 U.S.C. § 1401(18).[16] Consistent with Congress' intent of requiring provision of services which meet the unique needs of each handicapped child, the Act refrains from specifying any universal educational goal for all handicapped children or naming the services required to meet such a goal. Instead, Congress sensibly adopted a flexible standard—appropriate to meet the unique needs and capabilities of the child—and provided guidance as to the factors that should be considered in designing a particular program and determining whether it is "appropriate." Four essential factors were specified: (1) tests and evaluations of the child; (2) consideration of professional standards in the education field; (3) the viewpoint of the parents; and (4) the viewpoint of the local school district and the child's

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[16] "Special education" is defined by § 1401(16) of the Act as:

> [S]*pecially designed instruction*, at no cost to parents or guardians, *to meet the unique needs of a handicapped child*, including classroom instruction, instruction in physical education, home instruction and instruction in hospitals and institutions.

Emphasis added.

"Related services" are defined by § 1401(17) of the Act as:

> [T]ransportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education. . . .

teachers. These factors must be carefully weighed by the relevant decisionmaker;[17] the credibility of the witnesses must be determined and the validity of the various positions evaluated. In addition, the ultimate decision on the appropriate program must be reconciled with a statutory preference that educational programs be provided in a normal setting whenever possible. The Act is explicit on each point.

First, the Act recognizes that tests and other evaluation instruments are an important tool in assessing the unique capabilities and needs of a handicapped child. Therefore, the Act provides that "no single procedure shall be the sole criterion for determining an appropriate educational program for a child," 20 U.S.C. § 1412(5)(C). Congress intended that "all relevant information with regard to the functional abilities of the child" be utilized in determining the appropriate placement. Senate Report, *supra* note 2, at 29. Assessments conducted in each area related to the child's disability must be taken into account, including, *inter alia*, tests of vision, hearing, social and emotional status and intelligence, depending upon the disability. Tests and other materials used must be "properly and professionally evaluated for the specific purpose for which they are being used." *Id.* Reliance is to be placed on tests of specific abilities, rather than upon general intelligence tests; for children with hearing, visual or communication disabilities, test selection and administration must provide protection that the test "accurately reflects the child's ability in the area tested and not the child's impaired communication skill." *Id.* at 29-30; 20 U.S.C. § 1412(5)(C).

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[17] In the first instance, and for the vast majority of children, a decision is reached by agreement of parents and school officials; in a small number of cases, the decision is made in plenary review by an impartial administrative hearing officer; and in a very few cases, a court makes the decision. *See* discussion generally in section III and *see* notes 23 and 24.

Second, the Act requires that an "appropriate education" be defined in light of accepted professional standards in the education field.[18] Qualified professionals are involved at every stage of the referral, assessment and placement process. Accepted professional standards are one of the benchmarks against which "appropriate" is to be measured.[19]

Third, the Act recognizes the importance of the viewpoint of parents in determining what is appropriate. Parental participation is encouraged by providing parents full access to their child's evaluations and records, 20 U.S.C. § 1415(b)(1)(A), and by requiring an opportunity for their participation in the development of their child's individualized education plan. 20 U.S.C. § 1401(19). Indeed, Congress intended that parents be actively involved as partners with school officials in each stage of the development of their child's program. House Report, *supra* note 2, at 13, 16, 19; Senate Report, *supra* note 2, at 11, 12. Thus, parents must be notified before any changes are initiated in their child's placement and they are afforded the opportunity of disputing school district decisions at any stage of the classification, assessment or placement process. 20 U.S.C. § 1415(b)(1)(C)(i), (ii). So critical a role do the parents play, that the Act makes provision for the involvement of substitute or "surrogate

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[18] In recognition of the important role professional judgment plays in determining the substantive content of "appropriate," the Act's due process protections for parents include the parents' right to obtain an independent educational evaluation of their child, 20 U.S.C. § 1415(b)(1)(A), and the right to present the testimony of "individuals with special knowledge or training with respect to the problems of handicapped children" at any stage of the process concerning their child's education. 20 U.S.C. § 1415(d).

[19] 20 U.S.C. § 1401(17); 1401(19); 121 Cong. Rec. 25540 (1975) (Rep. Miller) (the Act's administrative procedures are "designed to increase parental and professional input into the development of the program of education for handicapped children"). *See also* 20 U.S.C. § 1413(a)(3).

parents" for children whose parents are unavailable or unknown. 20 U.S.C. § 1415(b)(1)(B).

Fourth, the Act requires that the viewpoint of the child's teachers and other local school district officials be considered. This occurs in several ways. Local school district professionals and teachers play the primary role in evaluating the child and recommending needed services. In addition, the child's classroom and special education teachers are key participants in the individualized educational program (IEP) meeting. *See* 20 U.S.C. § 1401(19). Finally, the child's IEP—the document that specifies the services the school deems appropriate and will provide to the handicapped child—is initially prepared by the local school district, and thus reflects the school district's range of concerns. *Id.*; 20 U.S.C. § 1414(a)(5).

Fifth, the Act requires the factfinder to apply the nontechnical standard of "appropriate education" to the facts elicited from the four sources listed above. Like the "reasonable care" standard in torts, what is appropriate cannot be explained in the abstract, but flows from the totality of circumstances and the judgment of the trier of fact in each case.

Finally, the Act provides guidance on the interpretation of this information in the face of arguments for competing but comparably appropriate educational programs. Congress establishes a clear preference for services that enable handicapped children to participate with their nonhandicapped peers and that, to the extent possible, put these children on an equal footing with nonhandicapped children by exposing them to the same program opportunities.[20] While Congress recognized that for some children the use of special classes or even separate institutional programs may be necessitated by the nature

[20] Senate Report, *supra* note 2, at 12; House Report, *supra* note 2, at 9-10; 121 Cong. Rec. 25540 (1975) (Rep. Miller).

or severity of the handicap, it mandated education in regular classes, with the use of supplementary aids and services that make regular programs accessible, in all cases where there is a choice between services that are otherwise appropriate to meet the child's needs. 20 U.S.C. § 1412(5)(B).

Petitioners incorrectly advance a hard-and-fast rule (self-sufficiency) as the only interpretation of the term "appropriate" intended by Congress. Pet. Br. at 66. But, because of the range of needs and abilities of the children protected by the Act, PL 94-142's flexible standard does not lend itself to any more definitive statement. Children differ with regard to the nature of their handicapping conditions, the severity of their disabilities and their potential for intellectual growth and educational achievements. Even within discrete categories of handicapping conditions, children's levels of achievement and potential differ dramatically. Accordingly, goals for each of these children and the services required to achieve such goals must cover a broad spectrum.

For example, for most mentally retarded children, self-sufficiency is a reasonable and attainable goal. For others—particularly for children who are more severely retarded—even a goal of self-sufficiency might be unrealistic. For these children, Congress noted that education should be directed to increasing "their independence, thus reducing their burden on society." Senate Report, *supra* note 2, at 9. And for still others—those functioning at the higher levels of retardation—a goal of keeping up with some of their nonhandicapped classmates is perfectly realistic, given their potential for achievement.

Differences exist for extraordinarily talented and gifted handicapped children as well.[21] While "appropriate" serv-

[21] This Act was intended to serve all handicapped children, including the gifted and talented. As Senator Javits remarked:

> [H]andicapped youth . . . have minds and ambitions, too. One of them became President of the United States and remained President for an unprecedented four terms. There have been

ices for these children should generally be designed so that they may gain as close to equal access to the regular public school program as possible, the particular services required to achieve that goal may differ substantially from one child to the next.

As Congressman Quie explained in the House debate:

> [A]ll handicapped children are not the same. Children often have unique problems. Not all blind children need the same special program; many can be educated in regular classrooms with some assistance from readers and special braille textbooks; others are trained in specially segregated classrooms or institutions. Not all retarded children require special segregated classes; many can be educated in regular classrooms and given supplementary services through a resource program. As you can see, it is difficult to make a generalized statement that applies to all handicapped children.

121 Cong. Rec. 23707 (1975); *see also* 121 Cong. Rec. 37412 (1975) (Senator Stafford). It was in response, then, to this tremendous variation in the goals and services needed for individual children that the Congress turned to individual decisionmaking, using the flexible standard: appropriate to the unique needs of the handicapped child.[22]

This Court should not reshape what it took the Congress hundreds of witnesses and years of deliberation to craft. *Diamond v. Chakrabarty*, 447 U.S. 303, 318 (1980); *Environmental Protection Agency v. National*

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other highly significant examples, although we do not need any better example than that of F.D.R. as to overcoming a handicap.

> That is what this [Act] is all about.

121 Cong. Rec. 19495 (1975). *See also* Senate Report, *supra* note 2, at 12-13.

[22] House Report, *supra* note 2, at 9, 13-14; Senate Report, *supra* note 2, at 11; 121 Cong. Rec. 19483, 19484, 37410 (1975) (Sen. Randolph); 121 Cong. Rec. 25538 (1975) (Rep. Harris).

Crushed Stone Association, 449 U.S. 64, 83 (1980). Congress provided that the determination of the "appropriate" educational program is a factual determination left, in disputed cases, to the trier of fact.

> This conclusion may not satisfy an academic desire for tidiness, symmetry and precision in this area, any more than a system based on the determinations of various fact-finders ordinarily does . . . . If there is fear of undue uncertainty or overmuch litigation, Congress may make more precise its treatment of the matter by singling out certain factors and making them determinative of the matter . . . .

Commissioner of Internal Revenue v. Duberstein, 363 U.S. 278, 290 (1960).

III. PL 94-142 PROVIDES FINAL RECOURSE TO THE COURTS TO RESOLVE DISPUTES ABOUT THE CONTENT OF AN APPROPRIATE EDUCATIONAL PROGRAM.

The Congress has mandated administrative procedures at the local and state levels that will resolve over 99.99 percent of all educational program decisions under the Act. See notes 23 and 24, *infra*. However, in the very rare instance when a dispute between parents and the schools persists, the Act provides that the state and federal courts have full authority to take additional evidence and make decisions wholly independent from the administrative process.

The Act establishes an initial and mandatory nonadversarial mechanism designed to allow parents and school districts to reach agreement on the content of an appropriate educational program: the IEP meeting required by 20 U.S.C. § 1414(a)(5). At this meeting, parents and school district personnel share information about the child and discuss the services and placement that should go into the educational program. On the basis of this meeting and the information gathered on the child

(*see* discussion at 12-14, *supra*), the school district then prepares a written IEP and presents it to the parents for their review and approval. *See* 20 U.S.C. § 1415(b)(1) For the vast majority of all handicapped children, the parents give their approval at this stage and the program is agreed upon as appropriate without any further proceedings.[23]

To address the atypical circumstance when the parents disagree with the program proposed by the school district following the IEP meeting, and in recognition of the important role of parents in decisions affecting the lives of their children, *see, e.g., Pierce v. Society of Sisters*, 268 U.S. 510 (1925), section 1415 of the Act explicitly requires state and local education agencies to "establish and maintain procedures . . . to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education." 20 U.S.C. § 1415(a). Under the terms of the Act, the procedural safeguards apply to complaints with respect to "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(1)(E). Parents are entitled to a full panoply of due process safeguards in these administrative proceedings, including, *inter alia*, adequate notice, an opportunity to examine relevant records, an opportunity to obtain an evaluation of the child by independent experts, an opportunity for a full hearing before an impartial hearing officer and a right of appeal to the state educational agency. 20 U.S.C. § 1415(b)-(d).

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[23] Out of a total of 4,036,219 children receiving special education in the 1979-80 school year, fewer than .065% challenged any aspect of their special education in an administrative hearing. Unpublished data to be included in *Special Education Programs, U.S. Department of Education, Third Annual Report to Congress on the Implementation of Public Law 94-142: The Education for All Handicapped Children Act* (1982).

Finally, if disagreement persists, *either party* involved in a due process hearing may bring an action in any state court of competent jurisdiction or in federal district court.[24] 20 U.S.C. § 1415(e)(2). Paralleling the original administrative complaint, the court is authorized to entertain "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education," 20 U.S.C. § 1415(b)(1)(E), and to grant "such relief as the court determines is appropriate," 20 U.S.C. § 1415(e)(2).[25]

The scope of review set forth in the statute is as follows:

> [T]he court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

20 U.S.C. § 1415(e)(2).[26] Congress granted the courts

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[24] In 1980, fewer than .007% of children (256 children nationwide) for whom IEPs were written filed a complaint in either state or federal court relating to any aspect of their special education. National Center for State Courts, *Student Litigation: A Compilation and Analysis of Civil Cases Involving Students, 1977-1981*, 22 (1981).

[25] Petitioners' contention that the court is limited to review of procedural shortcomings and not to a determination of the content of an appropriate education for a child, is wholly inconsistent with the broad grant of authority to the court on the face of the statute and with the legislative history. *See* this section generally.

[26] The legislative history of this provision shows that Congress considered and rejected a lower standard of review. The initial bill passed by the House had provided that the court review would be limited to a determination whether the state's decision was supported by substantial evidence. H.R. 7217, 94th Cong., 1st Sess. (1975), *reprinted in* House Report, *supra* note 2, at 56. This standard was rejected in the Conference in favor of a statutory requirement that the court "shall hear additional evidence" and shall make "an independent decision based on a preponderance of the evidence." S. Rep. No. 455, 94th Cong., 1st Sess. 50 (1975) (Conference Re-

the discretion to make a decision independent from the state administrative proceeding because of the nature of the decision, the long history of state neglect and the voluntary basis of the program as a whole.

As described in part II of this brief, *supra*, the educational placement decision requires a careful balancing of various types of evidence elicited about an individual child and the application of a flexible standard ("appropriate education") to the facts. Aware of the tradition of local and state control of education in this country, Congress paid deference to this control and struck a delicate balance among federal, state and local decisionmaking.[27] The child's program is developed initially by the local school district, the entity responsible for convening individualized education program conferences and for writing the IEP. 20 U.S.C. § 1414(a)(5). If there is a dispute, a state administrative hearing is provided to hear evidence and resolve the matter. 20 U.S.C. § 1415(b)(2). Either party may appeal a hearing officer's adverse determination to the state education agency. 20 U.S.C. § 1415(c). Thus, only if a dispute remains unresolved after the local and state education agencies have had an opportunity to review the child's program can a complaint be filed in either state or federal court.

Congress (and the courts) have repeatedly addressed the weight courts should give to administrative decisions in proceedings such as the PL 94-142 education decision process. Congress has specified standards for review of administrative decisions ranging from *de novo* review to

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port), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 1480, 1503. *See* discussion in court of appeals decision below, 632 F.2d 945, 948 n.5 (2d Cir. 1980).

[27] *See*, for example, 121 Cong. Rec. 19482-83 (1975) (Sen. Randolph); 121 Cong. Rec. 37411 (1975) (Sen. Stafford); 121 Cong. Rec. 19502-03, 37418 (1975) (Sen. Cranston).

a near-absolute prohibition on review.[28] Here, Congress decided not to make the state administrative process dispositive. The discretion to take additional evidence and make its own decision was granted to the courts (both state and federal) because state and local education agencies had been discredited by their history of ignoring handicapped children. Congress found that state education agencies had repeatedly violated their own state laws in failing to provide these children an appropriate education.[29] Recourse to a decisionmaker independent of the education system was seen by the Congress as a way to make state and local education agencies directly accountable to handicapped children and their parents.

Moreover, the role of applying a somewhat flexible standard to a complex fact situation is neither a new nor an inappropriate role for the Congress to have assigned the courts. As the United States District Court for the Northern District of Alabama aptly noted:

> While this court is sharply aware of its lack of expertise in educational matters, the judicial function not infrequently involves the application of law to unfamiliar fields where reliance must be placed upon the testimony of experts.

Campbell v. Talladega Cty. Bd. of Ed., 518 F. Supp. 47, 53 (N.D. Ala. 1981). The lower courts asked to decide what education program is appropriate for a handicapped child under the terms of the Act have had little difficulty in applying the standards of the Act to the diverse fact

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[28] *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) (*de novo* review, discussed in *Chandler v. Roudebush*, 425 U.S. 840 (1976)); Federal Trade Commission Act of 1914, 15 U.S.C. § 41 ("Findings of fact, if supported by substantial evidence, shall be conclusive."); Immigration Act of 1952, 8 U.S.C. § 1252(b) ("the decision of the Attorney General shall be final").

[29] House Report, *supra* note 2, at 10; 121 Cong. Rec. 23706-07 (Rep. Quie); 121 Cong. Rec. 19487-91 (Table 3; Status of State Education Programs for Handicapped Children). *See* discussion at 5-9, *supra*.

situations. *See, e.g., Campbell v. Talladega Cty. Bd. of Ed., id.* (program for a severely retarded child which fails to teach functional or communication skills is not appropriate under the Act); *Bales v. Clarke*, 523 F. Supp. 1366 (E.D. Va. 1981) (special school program supplemented by one-on-one instruction, language therapy and speech therapy is "appropriate" to meet plaintiff's special needs. School need not provide best possible program); *Springdale School Dist. v. Grace*, 494 F. Supp. 266 (W.D. Ark. 1980) (placement in public school supplemented by auxiliary services, although not the best possible education for a deaf child, provides an "appropriate" education).

IV. CONGRESS INTENDED TO CREATE INDIVIDUAL RIGHTS AND STATES ACCEPTING FUNDS UNDER PL 94-142 RECEIVED ADEQUATE NOTICE OF THIS FACT.

Petitioners contend for the first time in this Court that the Act did not create any individual right to a free appropriate public education, that the state was not on notice that the Act created such a right, and that the state is required to do nothing more than that which is contained in its state plan submitted to the federal government under the Act. Because these arguments were not made in the courts below, *amici* suggest they are not properly before this Court now.[30] *Hormel v. Helvering*, 312 U.S. 552 (1941). Even if this Court decides to consider these arguments, however, each is utterly without merit.

First, the entire statutory framework, as discussed in sections I-III of this brief, documents Congress' intent to create an individually enforceable right to a free appropriate public education after the respective 1978 and 1980 deadlines in those states choosing to accept funds under

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[30] Indeed, the New York State plan is not even a part of the record in this case.

the Act. Indeed, what other purpose could Congress have had both in creating a cause of action "to present complaints with respect to . . . the provision of a free appropriate public education to such child" and in expanding the jurisdiction of the federal courts to hear such complaints without regard to the amount in controversy requirement in effect at the time. 20 U.S.C. §§ 1415(b)(1)(E), (e)(2) and (e)(4). The Senate Report perhaps best summarizes the conviction of the Congress on this issue:

> It can no longer be the policy of the Government to merely establish an unenforceable goal . . . . S. 6 takes the positive necessary steps to ensure that the rights of children and their families are protected.

Senate Report, *supra* note 2, at 9. *See also* Senate Report, *supra* note 2, at 3, 13; House Report, *supra* note 2, at 15; 121 Cong. Rec. 37417 (1975) (Sen. Schweiker); 121 Cong. Rec. 19483 (1975) (Sen. Randolph); 121 Cong. Rec. 19492 (1975) (Sen. Williams); 121 Cong. Rec. 25538 (1975) (Rep. Harris); 121 Cong. Rec. 23707 (1975) (Rep. Quie).

Second, given the specificity of the Act, petitioners should have been on notice that PL 94-142 requires a full range of services designed to meet each child's "unique needs," and is not merely an encouragement to implement general congressional findings. Unlike the bill of rights provisions in the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6010, considered by this Court last term in *Halderman v. Pennhurst State School & Hospital*, 451 U.S. 1 (1981), PL 94-142 on its face and in its implementing regulations (34 C.F.R. Part 300) clearly and unambiguously conditions receipt of federal funds on the provision of a free appropriate education as determined for each handicapped child through an individual procedure, which includes judicial review of the content of an appropriate educa-

tion.[31] That petitioners actually knew this and agreed to these conditions when they chose to participate in the program every year since its enactment can be seen from their own most recent state plan under the Act[32] and from their continued participation in PL 94-142 following decisions of lower courts which they did not appeal and which have enjoined previous state attempts to limit services required by the Act.[33]

Third, petitioners are incorrect in asserting that the Act would allow the state plan they have submitted to the federal government to limit in any way their obligation to provide handicapped children an education appro-

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[31] This Court has long recognized that "[t]here is, of course, no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose terms and conditions upon which its money allotments to the states shall be disbursed." *King v. Smith*, 392 U.S. 309, 333 n.34 (1968). *See also, Lau v. Nichols*, 414 U.S. 563, 569 (1974); *Rosado v. Wyman*, 397 U.S. 397, 408 (1970); *Oklahoma v. Civil Service Comm.*, 330 U.S. 127, 142-43 (1947); *Halderman v. Pennhurst State School & Hospital*, 451 U.S. 1 (1981).

[32] There is no suggestion of the state's ability to limit services in its plan. Indeed, petitioners state they will provide by June 1, 1981, "the *most* appropriate placement for children with handicapping conditions." The New York State Plan Submitted Under the Education for All Handicapped Children Act (P.L. 94-142): 1980-81 at 15, emphasis added. In addition, petitioners recognize that educational program content is properly a part of administrative and judicial review. Petitioners state that "[y]our district must give you an opportunity to question or challenge recommendations and decisions about your child's educational program." *Id.* at 173. Further, the plan provides that "[i]f you are dissatisfied with the final determination or order of the Commissioner of Education, you can take your child's case to court." *Id.* at 176.

[33] *See, e.g., Riley v. Ambach*, 508 F. Supp. 1222, 1247 (E.D.N.Y. 1980) ("In this developing area of educational law, courts have frequently focused on the requirement that education programs must meet a handicapped child's unique needs and have accordingly invalidated broad rules [limiting services] imposed by the states.").

priate to each child's needs. The structure of the Act indicates that the principal conditions for receipt of funds are contained in sections 1412 and 1415 and that the state-plan requirements set forth in section 1413 serve a very different and more limited purpose. These require the state to set forth, *inter alia*, the policies and procedures it has adopted (1) to train additional personnel, acquire needed facilities and develop new services; (2) to establish accounting systems which provide adequate fiscal accountability for funds received under the Act; (3) to develop procedures for evaluating the effectiveness of programs developed under the Act; (4) to establish necessary recordkeeping systems; and (5) to protect the confidentiality of education records. 20 U.S.C. § 1413; 121 Cong. Rec. 37410 (1975) (Sen. Randolph). Noticeably absent from the Act's state-plan requirements is any hint that the plan is intended to allow states to define or limit in any way either the goals or services for children mandated by the other sections. Petitioners' claim to the contrary finds no support in the provisions of the Act.[34]

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[34] To the extent petitioners find support in subpart (B) of 20 U.S.C. § 1401(18) (the definition of free appropriate public education) for their theory that the state plan is to define the content of an "appropriate" education, their reliance is misplaced. Subpart (B)'s requirement that special education and related services under the Act "meet the standards of the State educational agency" was included to ensure that the normal accreditation and state-licensing standards that govern the quality of regular education services would apply to special education services as well. Congress heard testimony during the hearings preceding the passage of the bill about special education classes located in basements or in temporary facilities that failed to meet state standards for classroom space and about classes taught by unqualified teachers who were unable to obtain state certification to teach in regular classrooms. *See, e.g.*, Senate Hearings, *supra* note 4, at 45 (Paul Crawford); 409 (Raymond Miller). This provision was intended to end such discriminatory treatment and to ensure that state licensing and accreditation standards would be applied uniformly.

Finally, the Congress contemplated petitioners' need to plan for the cost of meeting the Act's conditions and gave states an extensive period of time during which they could receive federal funds and plan for the provision of services. House Report at 13, 15; Senate Report at 18. During the three- to five-year start-up period, states were supposed to identify handicapped children not being served; assess the kind and number of facilities, personnel and services necessary throughout the state to serve them; and develop and implement a "comprehensive system of personnel development" to train new teachers, retrain existing teachers and provide all teachers with significant information about handicapped children. 20 U.S.C. §§ 1412(2)(C), 1412(2)(A)(iii), and 1413(a)(3). In addition, this period gave states a chance to refine their data on the costs of meeting PL 94-142's requirements.[35] In short, petitioners had ample opportunity to assess the consequences of accepting the federal conditions that accompanied the federal dollars.

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[35] It is misleading for petitioners to point to the high cost of providing respondent a sign-language interpreter as an indication of the cost of serving children with other handicapping conditions or even other deaf children. As Congress recognized, the needs of handicapped children differ widely, both within and among categories, and the corresponding costs of services for these children differ as well. *See, e.g.*, House Report, *supra* note 2, at 11-12. Children with severe disabilities who need the most expensive services are by far the fewest in number. *Id.* Thus, deaf children account for only 6% of all handicapped children as compared, for example, with speech-impaired children, who need the least expensive service, and account for about 30% of all handicapped children. *Id.* Even among deaf children, very few will need sign-language interpreters. *See* Brief *Amicus Curiae* of National Association for the Deaf *et al.*

V. THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE AFFIRMED BECAUSE BOTH COURTS BELOW APPLIED THE PROPER STANDARD UNDER THE ACT IN DETERMINING THAT RESPONDENT IS ENTITLED TO A SIGN-LANGUAGE INTERPRETER IN HER ACADEMIC CLASSES AND BECAUSE THIS DECISION IS NOT CLEARLY ERRONEOUS.

Review by this Court of the concurring judgments of both the trial court and the court of appeals below should be limited to a determination of (1) whether the courts below applied the proper standard under the Act and (2) whether their conclusion was clearly erroneous.

As discussed in section II of this brief, the statutory standard adopted by the Congress requires flexible application to the facts of the particular case. If this Court finds that evidence as to each of the guiding factors established by the Congress was admitted and weighed in reaching the decision below, the Court should not attempt to decide *de novo* what services are needed to provide respondent an appropriate education. As the court of appeals noted, the decision on the issue presented in this case must be based on a sensitive weighing of multiple factual elements, including evidence concerned with "a particular child, her atypical family, her upbringing and training since birth, and her classroom experience." *Rowley v. Bd. of Ed. of Hendrick Hudson Cent. S.D.*, 632 F.2d 945, 948 (2d Cir. 1980). This Court has recognized that where a statutory standard requires the trial court to weigh "[a] multiplicity of relevant factual elements, with their various combinations, creating the necessity of ascribing the proper force to each . . . primary weight in this area must be given to the conclusions of the trier of fact." *Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278, 289 (1960). This is especially true where, as here, the impact of the decision below has been strictly limited to the unique facts of respondent's case. *Rowley*, 632 F.2d at 948. Because the courts below applied the proper

standards under the Act and because their findings were not clearly erroneous, this Court should affirm.[36]

First, the district court considered the results of at least five different tests and evaluations of the respondent. Consistent with the provisions of the Act and regulations, the court eschewed reliance on a single test or measure of respondent's ability and needs and, instead, considered auditory speech discrimination test results, intelligence test results and achievement test results. *Rowley*, 483 F. Supp. at 532 (S.D.N.Y. 1980). The court went beyond test scores to evaluate the methods of test administration. 483 F. Supp. at 532 n.6.

Second, the district court heard extensive evidence from experts in the fields of audiology and the education of deaf children. It weighed the evidence presented by experts testifying for plaintiffs and defendants, in light of the witnesses' qualifications and credibility, to decide what constituted accepted professional standards in the education of deaf children. In reaching its decision, the court took into account the largely uncontradicted evidence of respondent's experts concerning professionally accepted methods of deaf education. 483 F. Supp. at 535. It also relied upon evidence tying this information to respondent's unique capabilities and needs. *Id.*

Third, the court reviewed the testimony of respondent's parents concerning respondent's family life and background. Evidence concerning the parents' methods of

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[36] To the extent the district court's decision can be read as distilling from PL 94-142 a single, across-the-board standard for all children, *amici* disagree. However, because the district court admitted and carefully evaluated evidence of each of the factors established by Congress, its conclusion as to the goal and services appropriate to meet Amy Rowley's unique needs can and should be affirmed. The court of appeals recognized this and explicitly limited the district court's ruling to a standard that is appropriate only to determine this particular child's needs. 632 F.2d at 948. *See* discussion, *infra*.

addressing their child's handicap was weighed as an important factor in designing an appropriate education. 483 F. Supp. at 529-30.

Fourth, the court accepted the classroom teacher's assessment of respondent's behavior in the classroom and social interaction with other students and weighed this information in reaching its decision. 583 F. Supp. at 531 n.5. Although the court considered the local school's testimony that an interpreter would be disruptive in the class, it ultimately rejected this claim, basing its finding instead upon the testimony of respondent's expert witnesses. 483 F. Supp. at 536.

Finally, the court followed the Act's mandate that services be provided, where possible, in the regular classroom.

Based on all of these factors, then, the court determined that an appropriate education for respondent required the provision of a sign-language interpreter in her academic classes. In light of the evidence below, which showed (1) that Amy Rowley was an extraordinarily bright, energetic and capable child, with the potential to excel in school, (2) that she had a fluency in sign language unusual for a deaf child in second grade, (3) that she missed over 40 percent of verbal communication in the classroom and (4) that she could, with an interpreter, have full access to the regular class program, the lower court's decision was not clearly erroneous.

The court of appeals affirmed the district court's decision, concluding that the trial judge had "weighed and evaluated the evidence with great care" and that the findings of fact were not clearly erroneous. The court of appeals properly limited to the facts of this case the district court's conclusion that respondent was entitled to an interpreter in order "to bring her educational opportunity up to the level of the educational opportunity being offered to her nonhandicapped peers." 632 F.2d at 948, *quoting* 483 F. Supp. at 535. This guideline, although

not proper as an across-the-board standard under the Act, was an appropriate educational objective for respondent, given her potential to excel in school and her unusual facility with sign language.

CONCLUSION

Because both courts below applied the proper standard under the Act to the facts of this case and because their conclusion was not clearly erroneous, *amici* urge this Court to affirm the judgment of the court of appeals.[37]

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[37] If the Court questions the particular services ordered for respondent below, the Court should vacate and remand rather than make new findings of fact or reach a strained interpretation of the legal standard. A remand would allow the trial court to take such additional evidence as is necessary in light of this Court's construction of the Act, clear up some evidentiary confusion raised in the courts below, *see id.* at 954-55 (Mansfield, J., dissenting), and provide this Court with guidance from the lower courts on the application of the law to a complex set of facts.

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No. 80-1002

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY ET AL.,

Petitioners,

v.

AMY ROWLEY ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE MARYLAND ADVOCACY UNIT FOR THE DEVELOPMENTALLY DISABLED, INC. AND THE PRINCE GEORGE'S COUNTY COALITION FOR THE HANDICAPPED, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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IN THE

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BRIEF FOR THE MARYLAND ADVOCACY UNIT FOR THE DEVELOPMENTALLY DISABLED, INC. AND THE PRINCE GEORGE'S COUNTY COALITION FOR THE HANDICAPPED, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*

The Maryland Advocacy Unit for the Developmentally Disabled, Inc. (MAUDD) is an independent non-profit agency which has been designated by the Governor of Maryland as the State's Protection and Advocacy System. MAUDD is responsible for providing protection and advocacy services to Maryland's developmentally disabled

persons, including school age persons. It has actively represented numerous handicapped children and their families in proceedings under § 615 of the Education of the Handicapped Act as amended by the Education for All Handicapped Children Act of 1975 (P.L. 94-142), 20 U.S.C. §§ 1401-1420, and in litigation involving rights under the Act.

The Prince George's County Coalition for the Handicapped, Inc., is an organization with 30 member groups active in advocacy in Prince George's County, Maryland, on behalf of children and adults with virtually all disabilities. It and its members have actively participated in securing the establishment of laws, regulations and practices in Maryland to implement the policies and requirements of the Act.

These organizations and the disabled children and families they serve are directly affected by the issues involved in this case. They are vitally interested in maintaining the right of each handicapped child under the Act to a free appropriate public education.

SUMMARY OF ARGUMENT

1. Section 615 of the Education of the Handicapped Act, as amended in 1975 by P.L. 94-142, establishes an express private right of action to a judicial determination, based on the preponderance of the evidence, of any complaint with respect to "any matter relating to * * * the provision of a free appropriate public education" for handicapped children. Under the statutory definition of "free appropriate public education" and the terms "special education" and "related services" used in that definition, the right of review under § 615 includes the right to a determination of any dispute regarding the services to be provided in a child's individualized education program (IEP) to give him an appropriate education. The legislative history confirms explicitly that this is what

Congress intended. Four different courts of appeals have so concluded; there is no case to the contrary. Petitioners' claim that the Act did not establish an enforceable right to a free public education is untenable.

2. The holding below does not "challenge" the New York State Plan or expose petitioners to "unlimited liability." The New York plan does not purport to list or identify particular services or disclose restrictions regarding their provision. The local district's refusal to provide an interpreter for Amy Rowley is not based on any disclosed rule or policy, but on an ad hoc determination made with respect to this case. If petitioners are right in their contention that silence in the state plan about a particular service forecloses any claim under § 615 that such a service is required in a child's IEP to provide him an appropriate education, the review provisions of the Act would be nullified. For instance, in New York the state plan is silent with respect to virtually all specific services, and thus none could be claimed under § 615. This is contrary to Congress' objectives.

That does not mean that States are exposed to "unlimited liability" under the Act. Restrictions on the provision of particular services should be disclosed in the state plan itself, so that the Secretary of Education can determine whether they are consistent with the statutory obligation to provide a free appropriate education to each individual child. If the Secretary's determination is adverse to the State, the State is entitled to judicial review. The State may decide whether to accept funding under the required conditions. But "where an inflexible rule [denying service without regard to individual need] has not been afforded this consideration it must certainly fall." *Battle* v. *Pennsylvania*, 629 F.2d 269, 280-281 (3d Cir. 1980), *cert. denied sub. nom. Scanlon* v. *Battle*, 49 U.S.L.W. 3954 (June 22, 1981). An ad hoc rule fashioned for a particular child, only to prevent review under § 615, is even less defensible.

ARGUMENT

Most issues involved in this case will be adequately briefed by others.[1] Therefore, these amici will not burden the Court with an extended discussion. There are two matters, however, that deserve elaboration, which we discuss in this brief. They concern the nature of administrative and judicial review under § 615 of the Education of the Handicapped Act ("EHA"), as amended, and petitioners' unfounded claim that the decision below exposes them to "unlimited liability." (Pet. Br. at 47).

I. § 615 OF THE EHA CREATES AN EXPRESS PRIVATE RIGHT OF ACTION TO ENFORCE THE RIGHT TO A FREE APPROPRIATE PUBLIC EDUCATION, AND ALLOWS JUDICIAL DETERMINATION OF THE ADEQUACY OF THE PARTICULAR SERVICES INCLUDED IN A CHILD'S INDIVIDUALIZED EDUCATION PROGRAM ("IEP").

Section 615(e) of the EHA provides that any party aggrieved "by the findings and decision" of administrative hearing officers in "due process" hearings under § 615 "shall have the right to bring a civil action with respect to the *complaint presented pursuant to this section* * * *." 20 U.S.C. § 1415(e)(2) (1976) (emphasis added).[2] The phrase "complaint presented pursuant to

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[1] In particular, we have reviewed the briefs filed by the *amici* National Association of the Deaf et al., and the Association for Retared Citizens of the United States et al., which thoroughly analyze the issues covered therein.

[2] In such an action "the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). These provisions were added to the bill, enacted as P.L. 94-142 in 1975, by the Conference Committee. The House bill, like the final legislation, provided for administrative hearings to review individual children's programs, because the House had concluded that "[i]t is clear that a federally-mandated grievance-compliance mechanism is essential of any fur-

this section" refers to subsection (b)(1), which provides that "the procedures required by this section shall include, but shall not be limited to * * * an opportunity to present *complaints* with respect to *any matter*[3] *relating to* the identification, evaluation, or educational placement of the child, or *the provision of a free appropriate public education to such child.*" 20 U.S.C. § 1415(b)(1)(E) (emphasis added). Thus, there is a right to judicial review regarding "any matter relating to * * * the provision of a free appropriate public education."

The phrase "any matter relating to * * * the provision of a free appropriate public education" refers to other provisions in the Act concerning "free appropriate public education." These provisions—which make "free appropriate public education" a "right" of each handicapped child and a "requirement" which must be provided as a "condition" of funding (20 U.S.C. § 1412 (1), (2), (5), (6))—define "free appropriate public education" as "special education" and "related services" which, in addition to being provided without charge, under public direction,

> "(B) meet the standards of the State educational agency,

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ther meaningful progress is to be made in serving the needs of handicapped children." H.R. Rep. No. 94-332, 94th Cong., 1st Sess. 14 (1975). The House bill, however, would have provided judicial review in which the findings of fact of the State educational agency would have been "conclusive if supported by substantial evidence" and also would have provided for remand for the taking of additional evidence. Joint Explanatory Statement of the Conference Committee, S. Rep. No. 94-455, 94th Cong., 1st Sess. 47-48 (1975). The conference substitute provided instead that the court should take additional evidence at the request of a party and that the decision would be based on the preponderance of the evidence. *Id.* at 47-50.

[3] The conference committee emphasized the broad scope of this provision by italicizing the phrase *"any matter"* in its discussion of this provision. S. Rep. No. 94-455, 94th Cong., 1st Sess. 48-49 (1975).

"(C) include an appropriate preschool, elementary or secondary school education in the State involved, and,

"(D) *are provided in conformity with the individualized education program* required under section 1414(a)(5)." 20 U.S.C. § 1401(18) (emphasis added).

Accordingly, the right to judicial review encompasses review of the individualized education program.

The required "individualized education program" ("IEP") must be in writing and must be developed and revised at least annually for each handicapped child at a "meeting" of the child's parents or guardian, the child's teacher, a representative of the educational unit, and the child himself where appropriate. 20 U.S.C. §§ 1401(19) & 1414(a)(5). It must include (A) a statement of the child's "present levels of educational performance," (B) a statement of "annual goals" and "short-term instructional objectives," (C) a statement of "*the specific educational services to be provided to such child*," (D) projected dates for initiation and duration of service, and (E) evaluation criteria and procedures. 20 U.S.C. § 1401(19) (emphasis added).

The nature of the "specific services" required in the IEP is stated in the statutory definitions of "special education" and "related services" which are part of the statutory definition of "free appropriate public education" in § 601(18). "[S]pecial education" means "specially designed instruction * * * *to meet the unique needs of a handicapped child*," and "related services" is defined as "transportation, and *such* developmental, corrective, and *other supportive services* * * * *as may be required to assist a handicapped child to benefit from special education* * * *." 20 U.S.C. § 1401(16), (17) (emphasis added).

Thus, disputes as to the "specific services" which must be included in the child's IEP to provide the child with "free appropriate public education"—a "right" upon

which federal funding is conditioned—are clearly within the scope of the "complaints" which are the subject of §615 and judicial review thereunder, *i.e.*, "complaints with respect to any matter relating to * * * the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(1)(E). Under § 615, courts can and must determine what services are necessary in a particular child's IEP to assure that the child receives the mandated "free appropriate public education."

The legislative history of the conference substitute which was enacted as § 615 explicitly confirms this conclusion. Senator Williams—a chief sponsor of the bill, committee chairman, and floor manager responsible for the legislation in the Senate—explained § 615 on the floor of the Senate. He stated that in addition to dealing with disputes about evaluation and placement, the section would allow a parent to "present a complaint alleging that a state or local education agency *has refused to provide services* to which a child may be entitled * * *."[4] 121 Cong. Rec. S20432 (daily ed. Nov. 19, 1975) (emphasis added). Moreover, the Senator stressed that "the language referring to 'free appropriate education' has been adopted to make clear that a complaint may involve matters such as *questions respecting a child's individualized education program * * * or any other question within the scope of the definition of 'free appropriate public education.'*" *Id.* (emphasis added). He also stated that "handicapped children and their parents are provided these protections in all matters relating to their identification, evaluation and placement, and in the provision of a free appropriate public education." *Id.* at S20430.

The legislative history therefore confirms that Congress intended review under § 615 of "*any matter*" relating to the provision of a "free appropriate public education,"

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[4] The services to which the child "may be entitled," as we have seen, means the services necessary to provide him with a free appropriate public education as defined in the statute, *i.e.*, one "specially designed" to meet his "unique needs."

including a refusal to provide particular services as part of a child's IEP. Every court that has had occasion to decide the matter has so ruled, including federal courts of appeals for four different circuits—the Second, in this case, and the Third,[5] Fifth,[6] and Seventh.[7] Petitioners' contention that Congress did not create individually enforceable rights in this regard (Pet. Br. at 24, 28, 30, 31, 34) is simply not tenable.

II. THE HOLDING BELOW DOES NOT EXPOSE PETITIONERS TO "UNLIMITED LIABILITY."

Petitioners contend both that the complaint in this case "challenged" New York's State Plan because the plan neither requires nor forbids provision of sign language interpreters—it is silent about this service—and that if the decision below is correct "Congress has created a scheme of unlimited liability for the states and local school districts." (Pet. Br. at 42-43, 46-47). They are not correct on either score.

As we have seen, the EHA defines "free appropriate public education" to mean, among other things, "specially designed instruction * * * to meet the unique needs of a handicapped child," and "such developmental, corrective, and other supportive services * * * as may be required to assist a handicapped child to benefit from special education * * *." 20 U.S.C. § 1401(16), (17), (18). A great many different services may be necessary to satisfy these statutory criteria and provide different children with an appropriate education. What services must be provided

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[5] *Tokarcik* v. *Forest Hills School Dist.*, Nos. 80-2844 & 80-2845, slip. op. (3d Cir. Sept. 8, 1981); *Kruelle* v. *New Castle County School Dist.*, 642 F.2d 687, 692-96 (3d Cir. 1981); *Battle* v. *Pennsylvania*, *supra*, 629 F.2d at 280-81.

[6] *Tatro* v. *Texas*, 625 F.2d 557, 561-64 (5th Cir. 1980).

[7] *Anderson* v. *Thompson*, 658 F.2d 1205, 1211, 1217 (7th Cir. 1981). *See also Springdale School Dist.* v. *Grace*, 656 F.2d 300 (8th Cir. 1981); *Ezratty* v. *Puerto Rico*, 648 F.2d 770 (1st Cir. 1981).

in each individual case is what the IEP and § 615 review procedures are all about.

The New York State Plan [8] does not purport to list or identify particular services, much less announce what restrictions the State or local districts do or may impose on their provision. The plan is silent about these matters. So far as appears on the face of the plan, they are left entirely for determination in the child's IEP, subject to administrative and judicial review under § 615, in which, as the plan itself states, parents may "challenge * * * any matter related to" initiation of or change in "the provision of a free appropriate public education for [the] child, or the refusal to make such changes." (Plan at 83-84).

Moreover, petitioners do not claim that they have any announced rule that purports to restrict the provision of a sign language interpreter, if participants in IEP meetings or hearing officers or courts in proceedings under § 615 deem one necessary to provide a particular child with education suited to his unique needs. The petitioner school district did not tell the hearing officers who heard this case or either court below about any such rule. Indeed, it is clear that no such rule exists, because the district itself experimented with the provision of a sign language interpreter for Amy Rowley. The rule, or policy, or whatever it is, that supposedly justifies the denial of an interpreter for Amy is one announced only in briefs filed in this Court, appears applicable to this case only, and reflects only petitioners' decision in this case to resist the provision of a sign language interpreter for Amy.

If petitioners are right—that the silence of the state plan about a particular service means that a local district

[8] Petitioners have failed to put the plan in the record, but we have examined *Helping Children With Handicapping Conditions in New York State: The New York State Plan Submitted Under The Education for All Handicapped Children Act, Final 1980-81* (hereinafter cited as "Plan"). Statements in this brief are based on that plan.

may refuse to provide that service based on ad hoc determinations that are not substantively reviewable under § 615—then almost no service can be required under § 615 if the State chooses, as has New York, not to discuss particular services in its plan. Such a conclusion would gut the Act; the IEP and review procedures of the EHA would be meaningless. Contrary to Senator Williams' statements, a refusal "to provide services" and "questions respecting a child's individualized education program" would *not* be reviewable. This position is wholly inconsistent with the plain words of § 615, and, as shown above, is not what Congress intended when formulating the administrative and judicial review proceedings provided by that section.

That does not mean, however, that the States are exposed to "unlimited liability." To be sure, as other amici demonstrate, Congress required a substantially increased commitment of resources by the States as a condition of federal funding. But as petitioners themselves demonstrate (Pet. Br. at 42-43), the Act provides them ample protection. The state should disclose any rules restricting the availability of services *in the state plan itself*—not in briefs filed in this Court. Whether the restriction is consistent with the statutory obligation to provide a free appropriate public education to all handicapped children can then be reviewed by the United States Secretary of Education. If the restriction is reasonably consistent with the statutory obligation, the Secretary will approve the plan and authorize funding. 20 U.S.C. §§ 1412-13. On the other hand, if the restriction would prevent the provision of an appropriate education in *some* individual cases, and therefore would be inconsistent with the statutory obligation to provide appropriate education for *all* handicapped children, the Secretary is required to disapprove the plan and withhold funding. 20 U.S.C. § 1416. The State is entitled to judicial review of this determination. *Id.* The State is free to determine whether to accept funds on the required terms and conditions, or whether instead to refuse such funds, as we

understand New Mexico has done. Under the Act, then, there is no problem of lack of notice to the State, and there is no question of "unlimited liability."

In short, the Act provides ample protection for petitioners' concerns about allocation of resources. As one court of appeals has said, "the Act contemplates that reasonable educational standards may be set by the states." *Battle* v. *Pennsylvania*, *supra*, 629 F.2d at 280. But "in promulgating these standards, the Act contemplates review and approval by the Commissioner of Education" [9] under 20 U.S.C. § 1413(c), "as well as procedural safeguards, including public notice and comment." *Id.*; 20 U.S.C. § 1412(7), (13). "In this way the Act assures that any state standard will be filtered through both the state educational agency, with its expertise and sensitivity to both educational and fiscal matters, the Commissioner of Education, with his expertise, and the general public." *Battle* v. *Pennsylvania*, *supra*, 629 F.2d at 280-81. But "where an inflexible rule [denying service without regard to individual educational needs] has not been afforded this consideration it certainly must fall." *Id.* at 281. An ad hoc rule fashioned for a particular child, only to prevent review under § 615, is even less defensible.

CONCLUSION

The decision below should be affirmed, or for reasons stated in the brief of the National Association of the Deaf et al., *amici curiae*, the writ of certiorari should be dismissed.

Respectfully submitted,

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[9] Now the Secretary of Education.

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Petitioners,

v.

AMY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY in their own right,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICI CURIAE OF THE NATIONAL ASSOCIATION OF THE DEAF, GALLAUDET COLLEGE, THE NEW YORK SOCIETY FOR THE DEAF, THE NATIONAL EDUCATION ASSOCIATION, THE AMERICAN COALITION OF CITIZENS WITH DISABILITIES, THE FOUNDATION FOR SCIENCE AND THE HANDICAPPED, THE DEVELOPMENTAL DISABILITIES ADVOCACY NETWORK, THE ASSOCIATION FOR CHILDREN AND ADULTS WITH LEARNING DISABILITIES, AND THE DISABLED IN ACTION OF PENNSYLVANIA, INC.

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QUESTIONS ADDRESSED BY THE AMICI

1. Whether the Education for All Handicapped Children Act provides a right to a free appropriate public education, enforceable individually in administrative and judicial proceedings.

2. Whether the Petitioners' alleged conformity with a state plan is a defense to a claim under 20 U.S.C. 1415 that a child's Individualized Education Program (IEP) should include a particular service.

3. Whether the Court of Appeals applied correct standards in holding that the evidence regarding Amy Rowley's unique educational needs supported the District Court's determination that a sign language interpreter is necessary to provide her with an appropriate education.

4. Whether the Writ of Certiorari should be dismissed as improvidently granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1002

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, AND THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Petitioners,

v.

AMY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY in their own right,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICI CURIAE OF THE NATIONAL ASSOCIATION OF THE DEAF, GALLAUDET COLLEGE, THE NEW YORK SOCIETY FOR THE DEAF, THE NATIONAL EDUCATION ASSOCIATION, THE AMERICAN COALITION OF CITIZENS WITH DISABILITIES, THE FOUNDATION FOR SCIENCE AND THE HANDICAPPED, THE DEVELOPMENTAL DISABILITIES ADVOCACY NETWORK, THE ASSOCIATION FOR CHILDREN AND ADULTS WITH LEARNING DISABILITIES, AND THE DISABLED IN ACTION OF PENNSYLVANIA, INC.

INTEREST OF AMICI CURIAE

Pursuant to Rule 36 of the Rules of the Supreme Court,[1] the *amici* file this brief in support of the respondent, Amy Rowley.

The National Association of the Deaf is a national non-profit organization with approximately 18,000 members who are hearing-impaired adults, parents of hearing-

[1] Letters of Consent to the filing of this brief are being lodged with the Clerk of the Court.

impaired children, and professionals in the area of services to deaf individuals. The National Association of the Deaf is the largest consumer organization of hearing-impaired people in the United States.

Gallaudet College is the only liberal arts college for deaf students in the world. Gallaudet College also has pre-college programs. Kendall Demonstration Elementary School for the Deaf was founded in 1965. In 1970, by Act of Congress, it was designated as a demonstration school, with responsibility to develop innovative programs and to serve as a model for the education of deaf children.

In 1969, Gallaudet College was authorized by the United States Congress to establish the Model Secondary School for the Deaf (MSSD). The MSSD program seeks to be a model program for the nation on the secondary school level. Total communication is used at Kendall and MSSD.

The New York Society for the Deaf was founded in 1911 and incorporated by special act of the New York State Legislature to provide a wide range of services to the deaf individuals in the metropolitan New York area.

The National Education Association (NEA), the nation's largest professional organization with a membership of 1.7 million persons, is an independent entity whose purpose is to advance the interests of the profession of teaching and to promote the cause of education. To this end the NEA has long advocated free, appropriate education for all handicapped individuals, including the provision of support services to meet the learning needs of disabled students.

The American Coalition of Citizens with Disabilities was founded in 1974 to secure and enforce the civil and human rights of all people with physical and mental disabilities.

The Foundation for Science and the Handicapped is a non-profit organization of successful professionals in

various fields who offer their skills to help solve problems related to being handicapped. The Foundation is concerned with developing increased educational and employment opportunities for handicapped individuals.

The Developmental Disabilities Advocacy Network (DDAN) is an independent, non-profit agency which has been designated by the Governor of Pennsylvania as the Commonwealth's Protection and Advocacy System. DDAN is responsible for providing protection and advocacy services to Pennsylvania's developmentally disabled persons, including school-aged developmentally disabled children.

The Association for Children and Adults with Learning Disabilities is an international organization of 60,000 parents, professionals and disabled adults whose purposes include improving regular and special education available to children with learning disabilities.

The Disabled In Action of Pennsylvania, Inc. (DIA) is an organization of disabled adults devoted to promoting the full participation of disabled Americans in education and in other aspects of society.

Because the decision of the Court in this case may impact on the judicial and administrative interpretation of the Education for All Handicapped Children Act, 20 U.S.C. 1401 *et seq.*, *amici* are vitally concerned with the outcome of this litigation.

STATEMENT OF THE CASE

Petitioners' Statement of the Case omits the most salient facts brought out on the record below, and the facts on which the decision below were squarely based: Amy Rowley does not understand approximately 41 per cent of what transpires in her classroom. The Court of Appeals pointed out that:

> The district court found, based on the evidence before it, including Amy's auditory speech discrimination tests, academic records, and observations of her

> in the classrooms, that Amy misses a substantial part of what goes on in her classroom. The court found that, while 59% of what transpires is now accessible to Amy under her present individualized education program, with a sign language interpreter 100% would be accessible to her. * * *
>
> This is not a class action in which the needs of all deaf school children are being determined. The evidence upon which our decision rests is concerned with a particular child, her atypical family, her upbringing and her classroom experience. In short, our decision is limited to the unique facts of this case. . . (Pet. App. A-6 to A-7).

SUMMARY OF ARGUMENT

The Act, its legislative history, contemporaneous regulations, court decisions and the New York state plan itself all expressly say that a free appropriate public education is a *right* which is individually enforceable under § 1415 of the Act. This right of action is not limited to the question whether school authorities' IEP recommendations are "in conformity with the state plan." Petitioners' contentions regarding state plans, certainly New York's plan, misconceive fundamentally the nature and purpose of these plans. Congress intended exactly what it said, that *any and all* matters relating to the provision of a "free appropriate public education"—including refusals to provide particular services—were to be subject to the individual complaint procedure established by § 1415.

There is no debate that a sign language interpreter service can be encompassed within the free appropriate public education requirement of the Act for a particular child. The Court of Appeals concluded that the services of an interpreter were necessary to bring Amy's educational opportunity up to the level of educational opportunity offered to her non-handicapped peers. They found this was a useful standard to determine if the school district was providing an appropriate education

to meet Amy's needs. This standard is completely in accord with the language and legislative history of the Act. Applying these legal criteria, two courts below properly concluded, as a matter of fact, that Amy could be appropriately educated only if she had access to total communication.

The Petitioners have raised issues for the first time in this Court that are not presented properly on the record or with sufficient clarity. The absence of the state plan from the record, for example, and the lack of any examination below of its role and function, is a serious impediment to evaluating Petitioners' assertions regarding the plan. In light of these difficulties, the writ of certiorari should be dismissed as improvidently granted.

ARGUMENT

I. THE ACT CREATES AN INDIVIDUAL ENFORCEABLE STATUTORY RIGHT TO A FREE APPROPRIATE PUBLIC EDUCATION FOR EACH HANDICAPPED CHILD IN STATES WHICH ELECT TO RECEIVE FUNDS UNDER THE ACT.

A. The Act Creates a Right to a Free Appropriate Public Education.

This is the first case in which this Court has been called upon to interpret Part B of the Education of the Handicapped Act, 20 U.S.C. 1401, 1411 *et seq.*, as amended by the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 [hereinafter "the Act"].

"The starting point in every case involving construction of a statute is the language itself." *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978); *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 472 (1977). The language of this Act expressly establishes a judicially enforceable individual right to a free appropriate public education and to services required to give content to

that right, for all handicapped children in each state that accepts funds under the Act.

The Act states that its purpose is "to *assure* that all handicapped children have available to them," within time periods specified in the Act, "a free appropriate public education which emphasizes special education and related services designed to meet their unique needs * * *." 20 U.S.C. 1401 note (emphasis added).

To accomplish that purpose, the Act requires a state to demonstrate that certain "conditions" must be met in order to qualify for assistance. 20 U.S.C. 1412. Among these "conditions" are the following:

1. "The State has in effect a policy that *assures* all handicapped children *the right* to a *free appropriate public* education." 20 U.S.C. 1412(1) (emphasis added).

2. The State has developed a plan setting forth the State's policies and procedures "to *assure*" that "a free appropriate public education *will be available* to all handicapped children * * * within the State," between certain ages, by specified dates. 20 U.S.C. 1412(2) (emphasis added).

3. The State has established procedures "to assure that, to the maximum extent appropriate," handicapped children receive supplementary aids and services to allow them to be educated with non-handicapped children. 20 U.S.C. 1412(5)(A) and (B); 1415.

These provisions are mandatory. Not only are they "conditions" of funding, but they are also "requirements": the State educational agency is "responsible for *assuring*" that these "*requirements* are carried out." 20 U.S.C. 1412(6) (emphasis added).[2]

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[2] Thus, the provisions in question here bear no resemblance to the provision held to be precatory in *Pennhurst State School and Hospital* v. *Halderman*, —— U.S. ——, 101 S. Ct. 1531 (1981).

The legislative history of the Act confirms congressional intention to create a statutory right to a free appropriate public education, enforceable against the states. The Senate Report summarizes the conviction of the Congress on this issue:

> It can no longer be the policy of the Government to merely establish an unenforceable goal . . . . S. 6 takes the positive necessary steps to ensure that the rights of children and their families are protected.

S. Rep. No. 94-168, 94th Cong., 1st Sess. 9 (1975). *See also* H. Rep. No. 94-332, 94th Cong., 1st Sess. 15 (1975).

In addition, contemporaneous regulations adopted by the agency charged with enforcement of the statute confirm that a right to a free appropriate public education was created by the Act. *See* 34 C.F.R. 300.300 (each state shall "insure" that a free appropriate public education is available). The agency's accompanying comments call the obligation a "requirement." 42 Fed. Reg. 42488 (Aug. 23, 1977) [3]

All of the Courts of Appeals that have had occasion to deal with the matter have recognized that the Act creates a right to a free appropriate public education, and that § 1415 grants an express private right of action to enforce that right, including determination of the services to be included in a child's IEP. *Anderson* v. *Thompson*, 658 F.2d 1205 (7th Cir. 1981); *Kruelle* v. *New Castle County School District*, 642 F.2d 687 (3d Cir. 1981); *Tatro* v. *State of Texas*, 625 F.2d 557 (5th Cir. 1980); *Battle* v. *Comm. of Pa.*, 629 F.2d 269 (3d Cir. 1980),

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[3] See also 34 C.F.R. 300.121-122 (annual program plans to show that the state "insures" that a free appropriate public education is a "right"); 34 C.F.R. 300.346 (each IEP to contain a statement of the "specific special education and related services to be provided to the child"); 34 C.F.R. 300.504, 506 (complaint procedures apply to "the provision of a free and appropriate public education to the child.")

cert. denied sub nom. Scanlon v. *Battle*, 80-827 (June 22, 1981).

The existence of a statutory right to a free appropriate public education was never contested by Petitioners until this new issue was raised in their brief before this Court. Indeed, the New York state plan acknowledges that the Act "guarantees certain rights to children with handicapping conditions and their parents," and requires the state to "promise" that a free appropriate public education "will be available" to all handicapped children between 3 and 18 by September 1, 1978. *Helping Children with Handicapping Conditions in New York State: The New York State Plan Submitted Under the Education for All Handicapped Children Act, Final, 1980-81*, p. 33-34. See State Plan, Appendix A. The plan also states that "(a)ll school-age children have an *absolute right* to a free appropriate education." *id.* at 183. (emphasis added). It was written to explain "the requirements of the Federal Education for All Handicapped Children Act . . . ." *id.* at ix. The plan expressly recognizes the rights and obligations that the state would incur on receipt of federal funds under the Act. New York, therefore, had notice of rights created by the Act, and the obligation imposed on it. The Petitioners now suggest, for the first time, that no rights were created. However, their own admissions in their state plan contradicts this contention.

The Act, its legislative history, contemporaneous regulations, court decisions and the New York state plan itself all expressly say that a free appropriate public education is a *right.*

B. The Act Provides an Individual Cause of Action on Any Matter Related to Provision of a Free Appropriate Public Education.

The right to a free appropriate public education is individually enforceable under the Act, 20 U.S.C. 1415. A handicapped child and his/her parents can present

complaints in administrative and judicial forums on "any matter relating to . . . the provision of a free public education to a [handicapped] child." 20 U.S.C. 1415 (b)(1)(E). The Conference Committee intentionally emphasized "*any* matter" to stress the broad scope of the complaint procedure. S. Rep. No. 94-455 (Conf. Rep.), 94th Cong., 1st Sess. 48-49 (1975) (emphasis in original). Senator Williams—a chief sponsor, chairman of the Senate committee and floor manager for this legislation—made explicit in the floor debate that the intent of the Conference provisions was to allow review of questions relating to a particular service. He pointed out that in addition to disagreements about evaluation and placement, a parent "may present a complaint alleging that a state or local educational agency has *refused to provide services* to which a child may be entitled * * *" 121 Cong. Rec. 37415 (1975) (emphasis added).[4]

Thus, Congress intended exactly what it said, that *any and all* matters relating to the provision of a "free appropriate public education"—including refusal to provide particular services—are subject to the individual complaint procedure established by § 1415. It clearly was not the intent of Congress to limit proceedings under § 1415 in the manner advocated by the Petitioners.

Judicial enforcement of individual program decisions under the Act does not undermine state and local agencies' authority to develop educational programs. Local education agencies, with the participation of parents, must annually identify, evaluate and plan for the unique educational needs of each handicapped child. 20 U.S.C. 1414(a)(5); 1415(b). When a dispute arises about any matter relating to the child's individual program, Congress established a due process procedure that

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[4] This Court has often noted that the statements of legislative sponsors deserve substantial weight in interpretation of a statute. *Simpson* v. *U.S.*, 435 U.S. 6, 13 (1978); *National Woodwork Mfg. Ass'n.* v. *N.L.R.B.*, 386 U.S. 612, 640, rehearing denied, 387 U.S. 926 (1967).

gives the state the first opportunity to resolve factual disputes, to review contested decisions, and to correct errors involving evaluation, placement and programs. 20 U.S.C. 1415(b)(1), 1415(c). But the statute does not leave the final decision with the state or local agency; rather, aggrieved parties have a statutory right to bring a civil action in state or federal court contesting any matter which could have been raised during the administrative proceeding below. 20 U.S.C. 1415(e)(2). This express private right of action further distinguishes this Act's statutory scheme from the Developmental Disabilities Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6000 *et seq.*, at issue in *Pennhurst*.

Congress realized that judicial review of individual program decisions was necessary because of the past neglect of handicapped children by the states that led to passage of the Act. The House Report pointed out that in spite of increased recognition of the rights and needs of handicapped children, there existed

> . . . an alarmingly high number of handicapped children who do not have an appropriate special education available to them. It is clear that a *federally-mandated grievance-compliance mechanism is essential* if any further meaningful progress is to be made in serving the needs of handicapped children. H. Rep. No. 94-332, 94th Cong., 1st Sess. 14 (1975) (emphasis added).

When a civil action is brought, the court receives the records of the administrative proceedings below. The Act, however, does not require a court to give specific weight to the decisions previously made by the agency. The statute contemplates a *de novo* review role by a district court, including the hearing of additional evidence and reaching an independent decision based on a preponderance of the evidence. 20 U.S.C. 1415(e)(2).[5]

[5] The Conference Committee deliberately "strengthened" § 1415 by requiring independent judicial enforcement of the Act. S. Rep. 94-455 (Conf. Rep.), 94th Cong., 1st Sess. 48-49 (1975). In addi-

See also, Kruelle v. *New Castle County School District*, 642 F.2d 687 (3d Cir. 1981); S. Rep. No. 94-455 (Conf. Rep.), 94th Cong., 1st Sess. 50 (1975). Finally, the Act grants the courts wide discretion to order "such relief as the court determines is appropriate" 20 U.S.C. 1415 (e) (2).

Congress has created a statutory right, and provided for an explicit statutory remedy through the courts. This Court has repeatedly emphasized that it must defer to such express decisions of the legislature.

> We have emphasized in the recent past that "[o]ur individual appraisal of the wisdom or unwisdom of a particular [legislative] course . . . is to be put aside in the process of interpreting a statute." *TVA* v. *Hill*, 437 U.S. 153, 194 (1978). Our task, rather, is the narrow one of determining what Congress meant by the words it used in the statute; once that is done our powers are exhausted. *Diamond* v. *Chakrabarty*, 447 U.S. 303, 318 (1980).

See also *Environmental Protection Agency* v. *Nat'l Crushed Stone Ass'n*, 449 U.S. 64 (1980).

II. SUPPORT SERVICES PROVIDED AS PART OF A FREE APPROPRIATE EDUCATION MUST MEET THE UNIQUE NEEDS OF EACH HANDICAPPED CHILD.

A. The Scope of Supportive Services Required to be Provided Under the Act is Not Limited by the Contents of a State Plan.

Petitioners contend that a district court's review under § 1415(e) (2) is limited to determining whether the education program or other services being offered to a handicapped child are in express violation of the state plan.

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tion, Congress rejected a "substantial evidence" standard of judicial review for claims brought under the Act, *id.* at 47-50, and instead authorized the reviewing court to "bas[e] its decision on the preponderance of the evidence." 20 U.S.C. 1415(e) (2).

Such a contention sidesteps the clear and detailed language of § 1415 discussed above; ignores the statutory definition of special education as "specially designed instruction. . . to meet the unique needs of a handicapped child" 20 U.S.C. 1401(16); and misconstrues the content and function of a state plan.

A free appropriate public education includes special education and related services which meet each of the following four conditions:

> (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section [1414(a)(5) of this title.] 20 U.S.C. 1401 (18).

Petitioners contend that a free appropriate public education for every child is whatever the state agency by means of "standards", referred to in subpart (B), says it is. Obviously, such a reading would make the entire remainder of this statute meaningless. As the United States has pointed out:

> Even if the "standards of the State Educational Agency" . . . were set out in the State plan, and even if Amy Rowley's education met those standards, neither of which has been established on the record, the services provided to her would not be appropriate if they failed to satisfy any other provisions of 20 U.S.C. 1401(18). See United States brief in opposition to granting certiorari in this case, p. 13.

Limiting a state's obligations to providing only the services identified in a state plan could, as in this case, foreclose provision of necessary special education and supportive services. Such a result is contrary to the Act's requirement that "special education" be "specially designed . . . to meet the unique needs of a handicapped

child," 20 U.S.C. 1401(16) as well as 20 U.S.C. 1401 (19), 1412 and 1415, and the other provisions of 20 U.S.C. 1401(18).

A state plan provides only a general administrative mechanism for determining eligibility under the Act. The plan, like the Act, does not and cannot prescribe in advance an individual child's program. The Congress specifically left that formulation to the Individualized Education Program (IEP) process. 20 U.S.C. 1401(19). For these reasons, a court cannot look to a state plan to determine whether a certain program or a particular service meets the child's "unique needs" and provides the "appropriate" program mandated by the Act.

Approval of a state plan merely connotes general approval of the procedures and overall planning set out in the plan. Such approval does not sanction the state's refusal to provide a particular service to an individual child, particularly where, as here, the plan does not directly address the issue in dispute.

The New York state plan is silent on the provision of sign language interpreters; however, Petitioners concede that such a service is not prohibited by the plan when a deaf child is found to need total communication.[6] (Pet. Br. at 42.) Notwithstanding silence of a state plan on the provision of a particular service, a state may be required to provide the service if it is necessary to meet the unique needs of an individual child. *See*, e.g., *Battle*

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[6] Total communication is a system of communication with deaf people that involves the flexible use of a wide range of communication methods—speech, amplification, manual sign language systems, touching and visual cues. Its hallmark is its emphasis on communication with a deaf person by simultaneously speaking or mouthing words and signing them. See the findings of the District Judge below. (Pet. App. C-3). Total communication would not always involve the use of a sign language interpreter in an education setting. An interpreter is not necessary when the teacher is skilled in sign language, as is usually the case when deaf children are educated in special classes or special schools.

v. *Comm. of Pa.*, 629 F.2d 269, fn.13 (3d Cir. 1980), *cert. denied sub nom. Scanlon* v. *Battle*, 80-827 (June 22, 1981) (services in excess of 180 days may be required for handicapped child in spite of silence or ambiguity of state plan).

The New York plan does not purport to identify or list any services that may be needed to provide a particular child with an appropriate education. It appears to require little if anything with respect to the identification, *or* evaluation, *or* placement, *or* the provision of a free appropriate public education for any handicapped child. Therefore, if Petitioners are right that the silence of the plan on such matters means that they are matters for unilateral decision by local school authorities and not subject to administrative or judicial review under § 1415, then Petitioners would be hardpressed to explain what issues of substance can be reviewed under § 1415, or what purpose the § 1415 review procedures serve. Congress deliberately rewrote § 1415 to prevent such a misinterpretation.

B. Provision of a Sign Language Interpreter is Within the Statutory Requirements of a Free Appropriate Education.

As was described in the previous section, the central mandate of the Act is that recipient states and their localities must provide their handicapped school-aged residents with free appropriate public education that meets their unique needs. 20 U.S.C. 1412(1); 1414(a)(1)(C)(ii). Given the vast array of handicaps covered by the Act and the almost infinite number of ways in which these handicaps can have an impact on particular children, Congress did not attempt to specify the precise content of an appropriate education for each handicapped child. Instead, Congress set out a detailed procedure for determining a free appropriate public education which permits individual programmatic decision-making.

Subpart (D) of the definition of free appropriate public education incorporates the process for individual decision-making known as the Individualized Education Program (IEP). 20 U.S.C. 1401(18). That process, described at length in § 1401(19), provides for qualified educators, together with the parents of the handicapped youngsters, to meet and develop an annual education program plan which takes account of each youngster's strengths and weaknesses. As noted earlier, any part of the IEP which is disputed can be reviewed by means of the detailed procedures described in § 1415.

The school system and Amy's parents are in agreement that Amy should be placed in regular classes with her age group. The dispute centers around the kind of special supplementary aids and services she needs to participate meaningfully in the education program. In determining what education program will meet the child's unique needs, the state must assure that "to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped. . . ." Separate education is permissible only when "the nature and severity of the handicap is such that education in regular classes without the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. 1412(5)(B). Moreover, each local education agency must assure that "to the maximum extent practicable and consistent with [20 U.S.C. 1412](5)(B)," it will provide "special services *to enable (handicapped) children to participate* in regular school programs." 20 U.S.C. § 1414(a)(1)(C)(iv).

There is no debate that a sign language interpreter service can be encompassed within the free appropriate public education requirement of the Act for a particular child. It has already been noted that, to the extent that it is relevant, the New York state plan does not prohibit interpreters for deaf children. The Court of Appeals below noted that Petitioners "concede that the defi-

nition of 'special education,' Section 1401(16), and 'related services,' Section 1401(17), and regulations promulgated pursuant to the Act are sufficiently broad to encompass a sign language interpreter." (Pet. App. at A-5 fn. 4). In addition, sign language services can be "supplementary aids and services" within § 1412(5)(B). See 123 Cong. Rec. E4307 (daily ed. July 11, 1977) (remarks of Sen. Williams).

Subsequent 1978 legislation and its legislative history specifically cite interpreters as a necessary supportive service required by the Act. In the 1978 Amendments to the Rehabilitation Act of 1973, § 304(d), 29 U.S.C. 744(d), authorizes federal grants "[f]or the purpose of training a sufficient number of interpreters to meet the communication needs of deaf individuals." The Senate Report explains that § 304(d) was enacted partially "in response to the requirements imposed by . . . Public Law 94-142." S. Rep. No. 95-890, 95th Cong., 2d Sess. 41 (1978). Senator Stafford, the ranking minority member of the Subcommittee on the Handicapped, stated that this section would "seek to guarantee that properly trained interpreters would be available to our school age population of deaf children." 124 Cong. Rec. 30328 (1978).

In another statute, passed within a few days of the 1978 Rehabilitation Amendments, Congress expressly found and declared that "due to the rapid implementation of programs to assist handicapped individuals mandated under the Education for the Handicapped Act . . . there is a need for people to provide the special supportive services . . . *required* by these Acts." 29 U.S.C. 876(a)(1) (emphasis added). To meet this need, Congress directed the Secretary of HEW to establish programs ". . . which provide individuals with the skills necessary to train or provide assistance to handicapped persons, including, but not limited to, interpreters for the deaf and aides in classrooms to assist in the education of the handicapped." 29 U.S.C. 876(b).

In view of the above, it is clear that sign language services are within the scope of services required by the Act.

III. THE COURT BELOW PROPERLY CONCLUDED THAT AN APPROPRIATE EDUCATION PROGRAM FOR AMY ROWLEY MUST PROVIDE HER WITH EQUAL EDUCATIONAL OPPORTUNITY.

In determining which programs and services are required to meet an individual child's "unique needs,"

> . . . it is useful to approach the problem by asking what is the goal of the education that the Act requires the state to provide. Needs arise in the context of achieving certain goals, and surely there are certain ends, and not others, that are the concern of this legislation. *Armstrong* v. *Kline*, 476 F. Supp. 583, 603 (E.D. Pa. 1979); aff'd in part and remanded in part *sub nom. Battle* v. *Comm. of Pa.*, 629 F.2d 269, 276 (3d Cir. 1980), *cert. denied sub. nom. Scanlon* v. *Battle*, 80-827 (June 22, 1981.)

The Court of Appeals concluded that the services of an interpreter were necessary to bring Amy's educational opportunity up to the level of educational opportunity offered to her non-handicapped peers. They found that this was a useful standard to determine whether the school district was providing an appropriate education to meet Amy's needs. This standard is completely in accord with the language and legislative history of the Act. In its Statement of Findings and Purpose, Congress found that:

> [M]ore than half of the handicapped children in the United States do not receive *appropriate* educational opportunity which would enable them to have *full equality of opportunity*. 20 U.S.C. 1401 note (emphasis added).

The Senate Report accompanying the original bill restates Congress' concern with providing equal educational opportunity:

> This Nation has long embraced a philosophy that the right to a free appropriate public education is basic to equal opportunity and is vital to secure the future and the prosperity of our people. It is contradictory to that philosophy when that right is not assured equally to all groups of people within the Nation. . . . It is this Committee's belief that the Congress must take a more active role under its responsibility for equal protection of the laws *to guarantee that handicapped children are provided equal educational opportunity.* (emphasis added). S.Rep. No. 94-168, 94th Cong., 1st Sess. 9 (1975).

The major sponsors constantly reiterated the mandate of equal educational opportunity during floor debate on the 1974 Mathias Amendment and the Act.[7]

It is also clear that Congress intended that educational opportunity to handicapped children be measured in comparison to the opportunity available to non-handicapped children. As Senator Stafford, floor manager on the Act, declared:

> We can all agree that all handicapped children should be receiving an education. We can all agree that that education should be *equivalent, at least,* to the one those children who are not handicapped receive. 121 Cong. Rec. 19483 (1975) (emphasis added).

Perhaps the clearest example in the Act is found in the requirement that:

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[7] See, e.g., 120 Cong. Rec. 15267, 15268, 15273 (1974) (remarks of Sen. Mathias); *id.* at 15273 (Sen. Humphrey); *id.* at 15277 (Sen. Montoya); 121 Cong. Rec. 15832 (remarks of Rep. Quie); *id.* at 19483, 37410 (Sen. Randolph); *id.* at 19504 (Sen. Humphrey); *id.* at 19505 (Sen. Beall); *id.* at 23704 (Rep. Brademas); *id.* at 25540 (Rep. Grassley); *id.* at 37030, 37031 (Rep. Mink); *id.* at 37412 (Sen. Taft); *id.* at 37413, 37414 (Sen. Williams); *id.* at 37417 (Sen. Schweiker); *id.* at 37418, 37419 (Sen. Cranston); *id.* at 37419 (Sen. Beall).

> . . . [T]o the maximum extent appropriate, handicapped children . . . [must be] educated with children who are not handicapped. 20 U.S.C. 1412(5)(B).

The statute speaks of the provision of a "full educational opportunity to all handicapped children." 20 U.S.C. 1412(2)(A)(i). The House Report accompanying the Act emphasizes:

> (a) each child requires an educational plan that is tailored to *achieve his or her maximum potential.* . . . H. Rep. No. 94-332, 94th Cong., 1st Sess. 19 (1975) (emphasis added).

In the Senate Report:

> The Committee points out . . . that a handicapped child has a right to receive all services normally provided a non-handicapped child enrolled in a public elementary or secondary school. Thus, he has a right to . . . all other services which are provided to all children within the school system, and a right to as many options in curricula as are available to all children. S. Rep. No. 94-168, 94th Cong., 1st Sess. 12 (1975).

Both the statute and its legislative history show Congress' intent to insure meaningful educational opportunity to handicapped children.

Petitioners and Judge Mansfield maintain, however, that "self-sufficiency" is the chief goal of the Act, rather than equal educational opportunity. That position is based on a misunderstanding of the Act. As Congress realized and discussed throughout the legislative history of this Act, for some severely mentally impaired youngsters, an equal opportunity to achieve their very limited potential is an opportunity to reach toward self-sufficiency, a programmatic goal which is achieved by non-

handicapped and most handicapped children before reaching school or shortly thereafter.[8]

But this does not mean that an opportunity to achieve self-sufficiency would constitute equal educational opportunity for a child with less restricted educational potential. The District Judge in *Armstrong* noted the limited application of this programmatic goal to the severely mentally impaired youngsters who were the subject of that litigation.

> By enunciating this standard, the Court does not mean to imply that it is the only one that is used to evaluate whether a program is 'appropriate' and meets the 'unique needs' of the handicapped child. Of course, Congress may have had other goals that it wished the educational program to satisfy (including allowing the handicapped child access to programs available to non-handicapped students) which may be considered in determining whether a program meets the unique needs of the handicapped child. *Id.* at 604.

Congress included all handicapped children in the coverage of the Act. A self-sufficiency standard would not be applicable to the majority of these children and would therefore be inconsistent with Congress' intent to meet their unique needs.

Finally, contrary to the assertions of the Petitioners, defining appropriate education in part in relation to equal educational opportunity does not result in extraordinary or optimal programming for handicapped children. Equal educational opportunity does not require the provision of all programs and services which might prove beneficial to handicapped youngsters. Instead, it limits the mandate only to those items which are necessary to provide handicapped children with an educational oppor-

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[8] Most visually handicapped, deaf, hard of hearing, speech handicapped, orthopedically impaired and learning disabled children would be in this category.

tunity commensurate with that available to the non-handicapped children.[9]

Amy's case illustrates the inaccuracy of Petitioners' allegation that application of these legal criteria will result in optimal programming for handicapped children. Total communication will only give Amy an equal opportunity to have exposure to the same material, and to learn the same things, as children of comparable intelligence and initiative.

IV. THE COURTS BELOW MADE PROPER FACTUAL FINDINGS THAT ARE LIMITED TO THIS PARTICULAR CHILD.

A. The Courts Below Made Proper Factual Findings That Amy Rowley Requires Total Communication in Order to Receive an Appropriate Education.

Applying the legal criteria described in Section III, two courts below concluded, as a matter of fact, that Amy could be appropriately educated only if she had access to total communication.

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[9] Petitioners take out of context and make such of the District Court's statement that a determination regarding whether a child is receiving an equal educational opportunity requires "measurements" of "potential" and the "shortfall" between potential and achievement. In fact, the District Court never tried to undertake scientifically these measurements. Rather it focused on simpler and more readily discoverable factors such as how much Amy could be reasonably expected to understand, what physical impediments to equal opportunity were imposed by her handicap and whether the steps which had been taken by the school district were sufficient to overcome these impediments, and general information regarding the educational needs of and resources available to deaf children. The Court of Appeals approach only considers what services are necessary to bring Amy's educational opportunity up to the level of the educational opportunity offered to her non-handicapped peers. This equal opportunity approach does not require measurements and comparisons of "potential" or "shortfall."

This Court has held that "[i]t is not our place . . . to reappraise the evidence unless it plainly fails to support the findings of the trier of facts." *Roemer* v. *Board of Public Works of Maryland*, 426 U.S. 736, 758 (1976). Moreover, this Court has often held that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank and Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1948); *Berenyi* v. *Immigration Service*, 385 U.S. 630, 635 (1966).

There is no such exceptional show of error here. The District Court found on the basis of auditory speech discrimination tests that by making use of her hearing aids and her lip-reading skills, Amy can identify only 59 per cent of the words which are spoken to her. With the use of total communication, Amy can identify 100 per cent of the words which are spoken to her. The finding that she does not have access to 41 per cent of what is said in the classroom is further supported by evidence that Amy's word discrimination is hampered when there is noise in the classroom; when more than one person speaks at a time; when backs of speakers are turned to her or when films are being shown.

The District Court also found that her scores on the Metropolitan Achievement Test were about average for her class but that her scores on the Stanford Achievement Test, which was administered to her in sign language, were well above average, demonstrating that she performs at a higher academic level when provided with total communication.

The District Court found that this evidence "establishes that she understands considerably less of what goes on in class than she could if she were not deaf." (Pet. App. C-8, C-9). These findings rebut Petitioners' erroneous assertion that "Amy understands all of what is transpiring in her class." (Pet. Brief, 78).

The District Court also found that Amy's parents are both deaf and have raised Amy since birth using total communication. The Court recognized that her parents' efforts, as well as her own, enabled her to remain slightly above the median of her class. (Pet. App. C-14). The Court considered expert testimony that established without contradiction "that there is a marked trend toward the use of total communication in the education of the deaf—a trend supported by studies showing the greater degree of success of students brought up in deaf households using total communication." (Pet. App. C-16)

In making factual decisions regarding Amy, the courts properly considered, but were not bound by, "generally accepted methods of special education for the handicapped." (Pet. App. C-15). Nothing in the Act requires school districts or courts to ignore the available general learning concerning the education of students with a particular disability. The Court of Appeals carefully reviewed the record and a majority concluded "that the district court's findings of fact are not clearly erroneous, but are adequately supported by the evidence." (Pet. App. A-5).

B. The Limited Holding of the Court of Appeals that Amy Requires Total Communication to Meet her Unique Needs Does Not Dictate the Same Result for All Other Deaf Children.

Petitioners assert that if the lower court's decision stands, courts could make decisions "on the category of handicapping condition rather than on the unique needs of the individual pupil." (Pet. at 40). The Court of Appeals, however, based its decision on the evidence concerning "a particular child, her atypical family, her upbringing and training since birth, and her classroom experience." (Pet. App. A-7). They clearly limited their decision "to the unique facts of this case . . . ." (Pet. App. A-7).

The Petitioner Commissioner has conceded this point in his interpretation of this case in a recent administrative appellate decision. In the *Matter of the Appeal of the Board of Education of Sachem Central School District*, Commissioner Ambach reversed a hearing officer applying *Rowley* to all deaf children. The Commissioner held: "It is clear from the opinion affirming the District Court decision that the Circuit Court did not consider the lower court decision to be one of general application to all children who have hearing disabilities. Each case concerning the placement of deaf children must of necessity depend upon the needs and abilities of the individual child for whom the placement is sought" (See Appendix B at p. 15a).

Nevertheless, Petitioners distort the fiscal impact of this admittedly limited decision. Very few of the deaf and hard of hearing students in New York are in need of interpreter services.[10] Mildly to moderately hard of hearing students would not be materially aided by such a supplementary aid. Their handicap is not severe enough to require the use of total communication; a properly fitted and maintained hearing aid is sufficient in most such cases to give them full access to classroom discussion. Supplementary language and speech instruction would also be needed for some such students, but not classroom interpreting. Deaf children who have been brought up utilizing an oral approach and who are enrolled in oral programs do not depend upon sign language interpreting. Many of the severely to profoundly deaf children in New York State are in self-contained classes, whether oral or total communication classes. These children, while in such classes, do not require interpreting services. Presumably, their teachers possess the requisite

[10] Petitioners allege that there are 7,000 deaf and hard of hearing students in New York. However, New York's own State Plan indicates that in 1979-1980, there were only 3,449 deaf children and 1,609 hard of hearing children. See State Plan, Appendix A, at 213.

skills and certificates to teach them using the appropriate method. Such children may be mainstreamed for only part of their school day in particular subjects. In such instances, individual decisions about each child's need for interpreter services must be made taking a number of factors into consideration: the type of class, the child's abilities, the sensitivity and awareness of the teacher, the physical environment of the class, and other factors which may be unique to the situation. Brill, MAINSTREAMING THE PRELINGUALLY DEAF CHILD (1978). Similarly, many profoundly deaf children are in day schools and residential schools, and attend classes only with other deaf children.[11]

Finally, as the Court of Appeals pointed out, this case involves an atypical family. Only a small percentage of deaf children have deaf parents who have raised their children since birth using total communication. Thus this case is indeed unique with no general application. It will not have the effect of requiring a sign language interpreter for every deaf child in New York, since not every deaf child is in or will be placed in an educational environment in which interpreters are required.

V. *AMICI* SUGGEST THAT THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

Petitioners argue that the lower courts were wrong in failing to dismiss the complaint in this case "upon demonstration by the local school district that it was in conformity with the state plan." (Pet. Br. p. i). That issue is not properly presented in this case, and this Court has no basis to decide the question because Petitioners made no such "demonstration" below; they did not even

[11] The New York State Plan indicates that deaf children are in self-contained classrooms in local schools, in Board of Cooperative Educational Services (BOCES) programs, in one state operated school, in 7 state-supported schools, special act schools and nonpublic schools. See State Plan, Appendix A, at 60-61.

put the state plan in the record. This Court has held that a writ of certiorari is improvidently granted when an important issue is not presented properly on the record or not presented with sufficient clarity. *Jones* v. *State Board of Education*, 397 U.S. 34 (1970); *Massachusetts* v. *Painten*, 389 U.S. 560 (1968); *McCullough* v. *Kammerer Corp.*, 323 U.S. 327 (1945).

The absence of the state plan from the record and the lack of any examination below of its role and function under the Act is a serious impediment to informed evaluation of Petitioners' assertions regarding the plan. The absence of the plan from the record allows Petitioners, who now complain that they lacked adequate notice that Amy Rowley had enforceable rights under § 1415 of the Act, to advance their claims about the state plan without disclosing a number of facts about it. First, New York obtained funding under the Act upon the assurance in the state plan that "New York requires a free and appropriate public education for all children with handicapping conditions" (State Plan, App. A, p. 29) and that handicapped children in New York have the same "*absolute* right to a free appropriate education" (emphasis added) as their nonhandicapped peers (Id. at 183). Second, New York obtained such funding upon the further assurance in the plan that parents who do not agree with the local district's recommendations regarding their child's program have "the right to challenge, in a hearing, *any matter* related to [the local district's] attempt to initiate or change the identification, evaluation or educational placement of [the] child, *or the provision of a free appropriate public education for* [*the*] *child, or the* [*local district's*] *refusal to make* such changes" *Id.* at 183-84 (emphasis added).

The omission of these facts clouds the record. This case is an inappropriate vehicle for this Court's first decision on this Act.

On a related issue, Petitioners presented no evidence in the courts below on "the standards of the State educational agency." 20 U.S.C. 1401(18). These courts therefore had no opportunity to decide whether the "standards" are set out in New York legislation and regulations with respect to the education of handicapped children (N.Y. Education Law, §§ 4201-4210, 4351-57, 4401-09) (McKinney's); 8 N.Y.C.R.R. § 200.1, *et seq.*) or in the New York state plan.

The opinions of the majority in the Appeals Court and the District Court make no reference to the standards of the State educational agency. Even dissenting Judge Mansfield does little more than recite the fact that New York has enacted legislation and promulgated regulations which parallel the federal act.

As a final point, amici suggest that the writ should be dismissed because Petitioners have raised an issue not considered by the courts below. Relying on *Pennhurst*, Petitioners state for the first time that ". . . the Act is clearly a funding statute. . . It does not create a substantive right to a free appropriate public education. . . ." (Pet. Br., p. 31). However, the Court of Appeals has had no opportunity to consider the Act in light of *Pennhurst* or the state plan. Matters neither pleaded, argued, nor briefed in the lower courts are not to be considered by this Court. *Miree* v. *Dekalb County*, 433 U.S. 25, 33-34 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In light of these difficulties, this case is a singularly unsatisfactory one in which to review the issues discussed in Petitioners' brief. Accordingly, we respectfully urge this Court to dismiss the writ as improvidently granted.

CONCLUSION

For the foregoing reasons, we request this Court to affirm the judgment below. If this Court finds that the writ of certiorari was improvidently granted, *amici* suggest that this Court dismiss the writ.

Respectfully submitted,

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APPENDICES

APPENDIX A

HELPING CHILDREN

with Handicapping Conditions in New York State

THE NEW YORK STATE PLAN SUBMITTED UNDER
THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT (P.L. 94-142)

FINAL 1980-81

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT

HELPING CHILDREN with Handicapping Conditions

FOREWORD

The State Plan for the education of children with handicapping conditions is the public statement of the goals, priorities and programs of the State Education Department.

It was written for the people of New York State who have children or are interested in our educational system.

It explains not only the requirements of the Federal Education for All Handicapped Children Act, which requires an annual state plan, but other federal and State laws and regulations that affect handicapped children.

Your comments and criticisms are appreciated.

The State laws and regulations described in this Plan should make it clear to all New York citizens that:

- New York requires a free and appropriate public education for all children with handicapping conditions who are residents of New York.

  . New York's will provide free appropriate public education by September 1, 1980, to all children between 5 and 21, because these age limits for serving children are specified by state law.

How we carry out the requirements of federal and state laws is described in the rest of this plan.

- New York accepts the priorities in the federal Education for All Handicapped Children Act to serve:

  . first, those children with handicapping conditions who are not receiving any education, and

  . second, those children, within each disability, with most severe handicaps who are receiving an inadequate education.

All of the projects listed later in this plan had to conform to these priorities before they were approved for funding by the State Education Department.

- New York will comply with the federal requirement to prepare a timetable for meeting the goal of a free and appropriate public education for all handicapped children ages birth through twenty one.

- The New York State Education Department has encouraged the State Legislature to lower the legal school age of children with handicapping conditions to three; although the legislature has not yet done so the Education Department will continue to press for expanded services for all children with handicapping conditions aged birth to twenty one. See the Plan section on EARLY CHILDHOOD EDUCATION.

- New York will, of course, serve not only those children who live at home, but also those who live in facilities operated or supervised by the Office of Mental Health, Office of Mental Retardation and Developmental Disabilities, Division for Youth, Department of Social Services or Department of Correctional Services. New York's goals apply to all public agencies in the State.

BACKGROUND

FEDERAL LAWS

INTRODUCTION

This section describes federal laws, regulations and policy statements which govern education of New York's children with handicapping conditions.

Probably the most important federal laws affecting children with handicapping conditions are the 1975 Education for All Handicapped Children Act and Section 504 of the Vocational Rehabilitation Act Amendments of 1973.

DETAILED DESCRIPTION OF EDUCATION FOR ALL HANDICAPPED CHILDREN ACT (P.L. 94-142)

The Act:

- guarantees certain rights to children with handicapping conditions and their parents; including the right to:
  - an individualized education program written by the local education agency for each handicapped child,
  - parental review of records about their child's placement, written notice to parents of changes in placement and independent evaluation of their child if they wish,
  - a chance to appeal placement decisions,
  - non-discriminatory tests or procedures to place children,
  - wherever possible, education of handicapped children with non-handicapped children, and
  - a free education for handicapped children placed in private schools by the local educational agency because the public school can't provide the services the children need.
- gives money to the states:
  - only if a state will promise:

.. that a free appropriate public education will be available:

... by September 1, 1978 to all children between 3 and 18.

... by September 1, 1980 to all children between 3 and 21 except where such services are inconsistent with State law or practice.

.. that children who need special education will be identified, located and evaluated, and

.. that the State will serve first those children with handicapping conditions who are not receiving an education and, second, those who are receiving an inadequate education.

. local educational agencies which apply to their state to use federal money received under this law must make the same kind of promises about giving help which the State must make,

. special grants will be given to any state (to a maximum of $300 per child) which provides special education for children from 3 to 5, and

. federal funds can take the place of state and local funds only if a state can clearly prove that all children with handicapping conditions are getting a free appropriate public education.

- requires a state plan which will promise that:

. personnel serving handicapped children are properly trained,

. private school children will have a chance to participate in special education programs set up under this law,

. federal funds will be properly spent,

. programs to educate handicapped children will be evaluated at least once a year, and

. the State will have an Advisory Panel of handicapped persons, teachers, parents, state and local education officials and administrators of programs for handicapped children to give advice about services that are needed for handicapped children.

children in the program most appropriate to their needs, and evaluates the progress of such children. (For a detailed explanation, see the section on Committee on the Handicapped.)

BOARD OF COOPERATIVE EDUCATIONAL SERVICES

New York's BOCES were originally founded to offer services which could better be provided by groups of school districts. Each BOCES serves a number of school districts, and provides programs for children with handicapping conditions who cannot be served by a local school district. The local school district determines whether to contract with BOCES to provide such services.

STATE OPERATED SCHOOLS

The State School for the Deaf at Rome, is a boarding/day school for hearing impaired children whose sensory loss requires the use of special methods and a specialized language curriculum.

The State School for the Blind at Batavia, is a boarding/day school serving visually handicapped, blind and blind multi-handicapped children.

- The Office of Mental Health, Office of Mental Retardation and Developmental Disabilities, and the Division for Youth also operate schools.

STATE SUPPORTED SCHOOLS

These include:

- those schools listed in Section 4201 of the Education Law. These privately administered schools which receive state money are:

  . The New York School for the Deaf

  . St. Mary's School for the Deaf (Buffalo)

  . St. Joseph's School for the Deaf (New York)

  . Rochester School for the Deaf (Rochester)

  . New York Institute for Education of the Blind (New York)

  . Lavelle School for the Blind (New York)

  . Mill Neck Manor School for the Deaf (Nassau County)

- St. Francis de Sales School for the Deaf (Brooklyn)
- Cleary Deaf Child Center, Inc. (Suffolk county) and
- The Human Resources School (Albertson, Long Island)

"SPECIAL ACT" SCHOOL DISTRICTS

Special act schools are tuition free school districts by special act of the state legislature. Privately administered, these schools receive state funds.

Because these schools are residences for children, their residential programs are supervised by the Department of Social Services. The special act superintendent reports about the school's education program to the district superintendent of the supervisory district in which the school is located, however.

NON-PUBLIC SCHOOLS

These include:

- schools run by private groups, many of which are affiliated with religious organizations. Some of these schools have their own programs for children with handicapping conditions; others send their children to public schools for such services.
- private schools specifically for children with handicapping conditions. There are over two hundred such private schools whose programs have been certified as acceptable to the State Education Department. Parents can send handicapped children to private schools at local school district expense if the district can't provide a suitable program for the child.

STATE EDUCATION DEPARTMENT. OFFICE FOR EDUCATION OF CHILDREN WITH HANDICAPPING CONDITIONS.

Although other offices of the State Education Dept. provide services to the handicapped, the unit directly responsible for carrying out the mandates of the federal Education for All Handicapped Children Act is the Office for Education of Children with Handicapping Conditions. A chart showing how that office is organized is on the next page.

As the chart shows, the Office includes:

CHALLENGING DECISIONS OF THE COMMITTEE ON THE HANDICAPPED

From Your Child's Right to an Education:
All school-age children have an absolute right to a free, appropriate education. Your handicapped child is entitled to the same rights and privileges as nonhandicapped children. As a parent of a handicapped child, you also have rights that protect you and your child. Your school district must take certain steps to protect these rights to make sure that your child's needs are accurately evaluated and that he/she gets the educational services needed. The procedural steps that your district must take to protect your handicapped child's educational rights are called "due process" safeguards.

Your district must give you an opportunity to question or challenge recommendations and decisions about your child's educational program. Whenever possible, attempt to settle these disagreements between you and the school officials informally by meeting with the Committee on the Handicapped. Open lines of communication between parents and school officials often solve problems before they start.

In an earlier section of this plan, the role of the Committee on the Handicapped was discussed, so you already know that the Committee must secure your written permission to conduct an evaluation of your child to determine his/her need for special education services. You may request an informal conference to discuss the need for the testing and, if necessary, request a hearing to challenge the need for the evaluation.

You also know that you are entitled to an informal letter or a phone call advising you of your opportunity to speak to the members of the Committee on the Handicapped regarding the classification and placement of your child before the Committee has made any recommendations to the Board. Your district must send you a formal letter called a notice which explains the actual recommendations of the Committee and the reasons upon which the recommendation is based.

If you do not agree with the recommendation of the Committee, you have the right to request a hearing, which is a formal, legal procedure. To do this, send a letter to your Board of Education. Keep a copy of your letter. Federal regulations give you the right to challenge, in a hearing, any matter related to a Committee's attempt to initiate or change the identification, evaluation or educational placement of your child, or the

provisions of a free appropriate public education for your child, or the Committee's refusal to make any changes.

Once the Board has received your request, it must arrange for a hearing. It is up to the school district to make certain that the following procedures are followed:

The hearing must be conducted by an Impartial Hearing Officer. The Hearing Officer cannot be employed by, or be an officer or agent of, your local school district or BOCES. He/she must be unbiased and give you and other spokesmen of your child an opportunity to present your side of the dispute. Your school district must keep a list of hearing officers and their qualifications.

A written or tape-recorded verbatim (word-for-word) record of the hearing must be made and be available to you and everyone who participated in the hearing.

If they are needed, interpreters of the deaf and/or interpreters of the language spoken in your home must be available. The district must pay for this service.

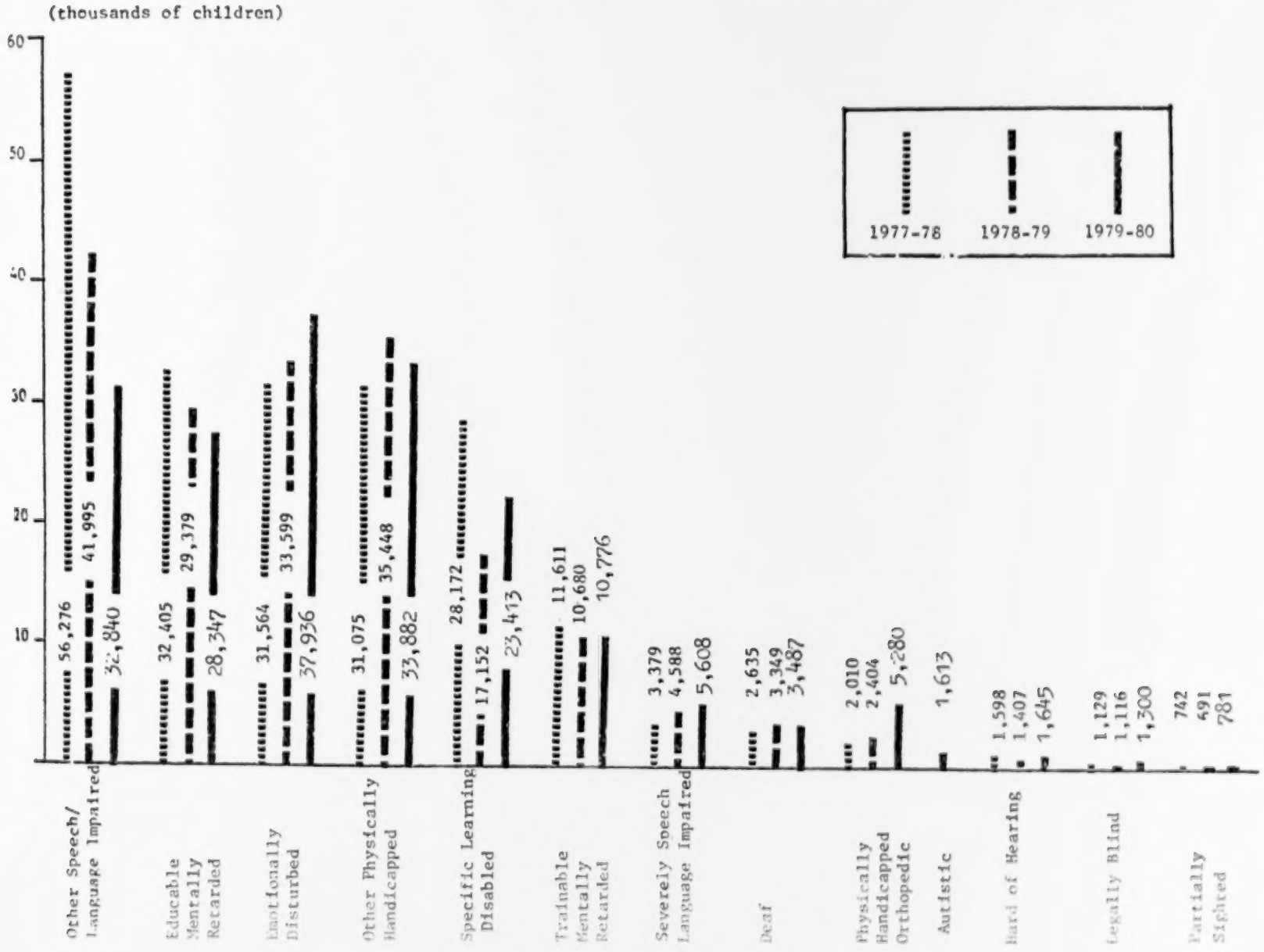
You may be represented by an attorney and/or accompanied by professionals and any other persons of your choice to the hearing.

You and/or your attorney will have an opportunity to question the school authorities and all witnesses; they will also have an opportunity to question you. All evidence that is introduced at the hearing must have been shared with the other party to the dispute at least five days before the hearing. All parties at the hearing must be given an opportunity by the Impartial Hearing Officer to present evidence and testimony.

If your child is over the age of 18, he/she may attend the hearing; if your child is not yet 18, you can decide whether or not he/she should attend. Federal regulations require the hearing to be at a reasonably convenient time and place for parents.

After both sides have presented their cases, the hearing officer must make a decision. Federal regulations require a hearing officer to:

STATEWIDE TOTAL OF EACH HANDICAPPING CONDITION



APPENDIX B

No. 10447

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE DEPARTMENT OF EDUCATION
Before the Commissioner

IN THE MATTER
of the

[SEAL]

Appeal from the BOARD OF EDUCATION OF THE SACHEM CENTRAL SCHOOL DISTRICT at Holbrook from a decision of an impartial hearing officer, relating to the provision of special educational services.

C. Francis Giaccone, P.C. ....attorney for petitioner
John H. Mulvehill, Esq. .....attorney for respondents

This is an appeal by the board of education from a decison of an impartial hearing officer concerning the provision of special educational services to two children resident within the district. The board requests that I reverse the order of the impartial hearing officer and order that the children attend the Mill Neck School, a private school for the deaf. The appeal must be sustained in part.

In his decision, the hearing officer found that petitioner's recommended placement at the Mill Neck school for the deaf was not reasonable and directed petitioner to pursue placement for the children in programs conducted by local school districts. The hearing officer also directed petitioner to consider establishing appropriate

programs in the district for other children with needs comparable to those of the children whose placements are the subject of this appeal. In the interim, he directed the district to offer the childrens' parents the option of continuing their children at Cleary, their current school, or placing them in the Mill Neck school.

The first child is classified as deaf. He has attended the Cleary School for the Deaf, and is presently enrolled in a secondary program provided by that institution at Mercy High School. During the 1979-80 school year, the child was mainstreamed in several subjects, including ninth grade consumer math, fine arts and gym. He was also mainstreamed in a history program for one semester, but was removed from that program due to poor academic performance. All of his other instruction occurred in a resource room. This child has also participated in the Mercy high school track team as an extracurricular activity.

Formal testing thus far administered reveals that this child is functioning within the average range of intelligence, with a reading level at approximately fourth grade and a math level of approximately fifth grade. It must be noted that those test results, with one exception, are based upon hearing population norms. Thus, while these tests establish the child's relationship to hearing children in a mainstream placement, no accurate comparison between this child and other deaf children can be made. The test results were also influenced by improper administration in that several subtests had to be discontinued due to a lack of communication between the examiner and the interpreter. According to his IEP, this child is actually functioning at the ninth grade level in math, but his level in reading is not indicated in the IEP. None of his teachers from the Cleary school were present at the hearing to provide the missing information.

The child's classification as deaf is not challenged in this proceeding. However, there has been no audiological evaluation done to determine what benefit, if any, individual amplification devices, FM transmitters and other comparable devices might be to this child. In addition, although the record indicates that the child may have vision problems, there is no ophtalmological report in the record. In order to permit a proper assessment of this child's needs, certain additional information is necessary, including a complete educational assessment, a testing process which compares this student with other deaf children, and direct information from the classroom teachers who are currently instructing him.

The second child involved in this appeal began attending the Cleary school elementary program at the age of 4½ and entered the secondary program at the ninth grade level in September of 1979. During the 1979-80 school year, this child was mainstreamed in fine arts and gymnasium courses. All academic instruction was provided in a resource room.

The standardized tests administered during the 1979-80 school year indicate that this child is functioning within the average range of intelligence. He is reading at the fourth grade level and his mathematics performance is at the sixth grade level. As in the other case, these test results and scores are based on norms established for a hearing population. Thus, while they allow comparison of this child's abilities with hearing children, there is no way to determine how he would compare with other deaf children. He is functioning at the fifth grade level in mathematics, but the IEP does not indicate the instructional level for reading or any other academic area. Again, as in the other situation, no teachers from the Cleary school were present at the hearing to provide that information.

According to the coordinator from the Cleary school secondary program, this child has a learning problem and

requires multiple review of new material before being able to remember or use it. This seems to have been a factor in the determination that he would not benefit from placement in mainstreamed classes at Cleary. There was, however, no evidence in the record to indicate that any special education instructional services were provided for this problem.

The record thus presented does not provide a basis for determining the components which would constitute an appropriate program for this child. While, there is information in the record relating to this child's communication skills which indicate that the district's "Oral Program for Deaf Students" might be appropriate, without a comprehensive evaluation of the child's educational needs, a conclusive determination is not possible. Evaluations to be conducted should include a complete medical examination, an audiological evaluation to determine what benefit, if any, utilization of individual amplification devices might provide for this child, a social history to assess his current preparation and his potential for instruction with hearing peers, and the complete educational assessment referred to previously.

The information contained in the record does not support the placement recommendation made by petitioner. Moreover, two observations must be made as to any future recommendations for this student. A district does not discharge its obligation to provide an appropriate placement for a handicapped child by limiting its consideration to currently known placement options. There is no indication in this record that the district sought information with respect to other placement options which might be available in other local districts. Secondly, since this child is sixteen years of age and will soon be looking for employment in a world in which the vast majority of individuals are capable of hearing, the district should make every effort to determine the least restrictive environment for this child's education.

Based upon my review of the record, I find insufficient basis to sustain the recommendation made by petitioner to place both of these students in the Mill Neck School. In both cases, insufficient information about the youngster's needs was provided, and it was not evident that the district had evaluated sufficient program and placement alternatives in order to make a fully informed determination.

One other observation is worthwhile at this point. Although the hearing officer's decision does not directly address the issue, implicit in that decision is the finding that the decision and order of the United States District Court for the Southern District of New York in *Matter of Rowley* v. *Ambach*, 483 F. Supp. 528, aff'd —— Fed 2d ——, decision dated July 17, 1980 is one of general application to all deaf children. While the record does not indicate that the hearing officer had the benefit of having read the decision of the Circuit Court of Appeals in making his determination as to the placement of each of the children in this appeal, it is clear from the opinion affirming the District Court decision that the Circuit Court did not consider the lower court decision to be one of general application to all children who have hearing disabilities. Each case concerning the placement of deaf children must of necessity depend upon the needs and abilities of the individual child for whom placement is sought.

It is evident, therefore, that this matter must be remanded to petitioner in order that a comprehensive and individual assessment be conducted as to each child's educational needs to determine an appropriate placement. Any such assessment should, of course, include medical, educational, psychological and social evaluations.

While this further evaluation is being conducted, the children should remain in their current placements at the Cleary School for the Deaf (see *Matter of M. and K.* v. *Board of Education of the Sachem Central School Dis-*

trict at Holbrook, Supreme court, Suffolk County, Justice Stark, decision dated September 19, 1980 (n.o.r.)).

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED,

IT IS ORDERED that within thirty days of the receipt of this decision petitioner conduct further assessment of each child in accordance with this decision, and develop a comprehensive individualized education plan for them, and

IT IS FURTHER ORDERED that following the development of such a plan, petitioner review all program and placement alternatives that may be appropriate for each child and recommend placements for them.

THE APPEAL IS IN ALL OTHER RESPECTS DENIED.

IN WITNESS WHEREOF, I, Gordon M. Ambach, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 13th day of January, 1981.

/s/ Gordon M. Ambach
Commissioner of Education

[SEAL]

MOTION FILED
DEC 30 1981

No. 80-1002

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON SCHOOL DISTRICT, WESTCHESTER COUNTY, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, *Petitioners*,

v.

AMY ROWLEY, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE and AMICI CURIAE BRIEF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION and THE NEW YORK STATE SCHOOL BOARDS ASSOCIATION, INC. IN SUPPORT OF APPELLANTS

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION OF THE NATIONAL SCHOOL BOARDS ASSOCIATION and THE NEW YORK STATE SCHOOL BOARDS ASSOCIATION, INC. TO FILE BRIEF AS *AMICI CURIAE*

The National School Boards Association and the New York State School Boards Association, Inc. move this Court for leave to participate as *amici curiae* herein, for the purpose of filing the attached brief in support of appellants.

Consents to file this brief have been obtained by phone. The corresponding letters are in the mail, and will be filed with the Court upon receipt.

Respectfully submitted,

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MEMORANDUM OF THE NATIONAL SCHOOL BOARDS ASSOCIATION and THE NEW YORK STATE SCHOOL BOARDS ASSOCIATION, INC. IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

The National School Boards Association and the New York State School Boards Association, Inc. have moved this Court for leave to appear as *amici curiae* herein for purposes of filing the attached brief in support of appellants. Consent has been obtained from counsel for all parties.

Amicus curiae, National School Boards Association, is a nonprofit federation of this nation's state public school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. It is organized to promote the general advancement of education, to encourage the most efficient and effective organization and administration of the public schools, and to preserve the unique American tradition of local lay control, with education policy decisions rendered by those directly accountable to the public through the elective or appointive process. In its fortieth year, the National School Boards Association is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The individuals who make up this nation's school boards are elected or appointed community representatives, most of whom are not professional educators. They are responsible under state law for the fiscal management, staffing, continuity and educational productivity of the public schools within their jurisdictions. The National School Boards Association submits this brief in the belief that the decision of the U.S. Court of Appeals for the Second Circuit threatens the ability of the nation's school boards to effectively educate all the students entrusted to their care by eroding in significant measure the authority of states and school boards to make educational determinations based upon local and state fiscal and administrative concerns.

The New York State School Boards Association is a corporate instrumentality of the school districts of the State of New York and represents approximately seven hundred forty (740) such school districts, including the Hendrick Hudson School District. Each of its members receives, or is eligible to receive, financial assistance under the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401, *et seq.* (P.L. 94-142).

If the order of the Court below is affirmed, it may have a substantial effect on the formulation, content, financing and administration of the educational programs of every school district in the State of New York. In particular, it will have an effect on education of the deaf and on the requirement of educating handicapped children in the least restrictive environment.

As the decision in this case will have an impact on school districts throughout the country, the National School Boards Association and the New York State School Boards Association, Inc. urge this court to grant leave to present their views.

Respectfully submitted,

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No. 80-1002

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AMICI CURIAE BRIEF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION and THE NEW YORK STATE SCHOOL BOARDS ASSOCIATION, INC. IN SUPPORT OF APPELLANTS

INTERESTS OF THE AMICI CURIAE

Amicus curiae, National School Boards Association, is a nonprofit federation of this nation's state public school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. In its fortieth year, the National School Boards Association is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

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If the order of the court below is affirmed, it may have a substantial effect on the formulation, content, financing and administration of the educational programs of every school district in the State of New York. In particular, it will have an effect on education of the deaf and on the requirement of educating handicapped children in the least restrictive environment.

ISSUE PRESENTED FOR REVIEW

If we assume, *arguendo*, that with a particular service or educational methodology (such as "total communication"), a particular handicapped child will "fare better" in school, does the requirement in the Education for All Handicapped Children Act (P.L. 94-142) of a "free appropriate public education" require a school to provide that service or methodology to a handicapped child who is self-sufficient without the service and is progressing normally from grade to grade?

ARGUMENT

Introduction

Decisions such as the lower court's in this case threaten to erode local decision-making authority in education by displacing the decisions of the local education administrators and setting standards which go beyond the intent of Congress and decisions of this court.

P.L. 94-142 itself recognizes the importance of local decision-making in its requirement that an individual education program be developed for each handicapped child. 20 U.S.C. § 1414(a)(5) and 20 U.S.C. § 1401(19). The school system, based upon its expertise in the field of education

of handicapped children and upon the "unique" needs of the particular child, develops a program for the child. Nowhere in the Act, however, is there a requirement that the child reach "maximum potential", one standard noted by the District Judge Broderick's decision. The goal of the school district may differ depending on the intelligence level of the child—the goal for a severely retarded child may be to achieve self-sufficiency (a goal which may or may not be met depending on the severity of the handicap), or where a handicapped child has average or above average intelligence, the goal of the school system is to go from one grade to another and graduate with an average level of success. More than that cannot be required of a school system with regard to a handicapped child, any more than it can be required with regard to a non-handicapped child.

In order to understand the position of school boards on the pressing issue of their obligation to provide an education to all handicapped students in their school systems, it is important to look at the issue in the framework of the purposes of public education in this country.

Initially, the public schools were organized to teach citizenship and elementary basic skills to the "average" child. The system was not designed to handle the special needs of the "exceptional" child on either end of the spectrum—the gifted or the handicapped. In fact, many states expressly excepted from the requirements of mandatory education students found unable to profit from instruction. Of course, at that time "instruction" was defined in a narrow sense and included only one form of "instruction" *i.e.* the classic homogeneous classroom lecture method teaching only the "basics".

States and local school districts now recognize that each child in the school system must be treated as an individual. Educators are beginning to understand that strict equality of financial resources will not necessarily result in equality of educational opportunity. According to Office of Education

statistics, the cost of educating one handicapped child is in excess of twice as much as educating the non-handicapped. 121 Cong. Rec. 23705.

However, as the educational system swings from an emphasis on the group to an emphasis on the individual, we must assure that in the process we do not go so far as to exclude or substantially reduce services to the majority of students. If that happens, public support for public education will cease.

Education of the Handicapped—The Duty

Any legal analysis of the question of the duty to educate handicapped children must begin with *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954) which held first, that "an opportunity [of an education], where the State has undertaken to provide it, is a right which must be made available to all on equal terms" and second, that "separate educational facilities are inherently unequal." Since all states have taken upon themselves the duty to educate the children within their borders, the Equal Opportunity Clause of the 14th Amendment has been raised by Plaintiffs in several cases challenging methods of treatment of the handicapped by local school districts.

The first declaration that a constitutional duty exists to provide to all school-age children a public education arose in the U.S. District Court for the District of Columbia in *Mills* v. *Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972). In that case the school board had argued that the cost of providing an education to handicapped children would be prohibitive and, therefore, no duty existed to provide more than was provided to non-handicapped children. The court declared:

> The defendants are required by the Constitution of the United States, the District of Columbia Code and their own regulations to provide a publicly supported education for these "exceptional" children. . . . The District

of Columbia's interest in educating these excluded children must clearly outweigh its interest in preserving its financial resources. *If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system, then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia public school system whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child.* (Emphasis supplied).

It would appear that the court in *Mills* recognized that all needs of the handicapped children in the district need not be served as long as the entire or disproportionate burden of inadequate financing was not borne by the handicapped population.

A year before *Mills*, the case of *Pennsylvania Association for Retarded Children (PARC)* v. *Commonwealth of Pennsylvania*, 334 F. Supp. 1357 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972), presented the first case dealing with particular learning needs of the retarded. The case ultimately resulted in a consent agreement between the parties which recognized the principle that "each mentally retarded child must receive education and training appropriate to the child's capacity." This may have been the first judicial use of the term "appropriate" in the context of education of the handicapped.

By the time the Congress passed the Education for All Handicapped Children Act in 1975, *supra*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 some 45 cases on the subject of education of the handicapped had been decided by the courts.

None of these cases, however, related to the question of how far a school system must go in providing an "appropriate" education to handicapped children.

The Education of All Handicapped Children Act and Its Legislative History

The Education for All Handicapped Children Act of 1975, *supra*, replaced an earlier act which was passed the year before. That act, P.L. 93-380, included the first Congressional use of the word "appropriate" in the education context. In section 612(d) of P.L. 93-380 the Congress placed on the States the obligation:

> to provide procedures for insuring that handicapped children and their parents or guardians are guaranteed procedural safeguards in decisions regarding identification, evaluation and educational placement of handicapped children, including but not limited to: . . . (b) procedures to insure that, *to the maximum extent appropriate*, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular education environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. . . .

Certainly it is clear that the 93rd Congress used the word "appropriate" as a limitation on its strong direction to "mainstream" handicapped children, a direction which was in line with case law and educational debate of civil rights advocates at that time. The Conference Report on the bill also indicates the intent to equate "appropriate" with full or equal educational opportunities. H.R. Report 93-1211 at 193 (1974).

In 1975 the Senate Committee on Labor and Public Welfare issued its report on S. 6 (which ultimately became the Education for All Handicapped Children Act of 1975), S. Rep. 94-168 (1975). The Report discussed the 1974 Act provisions on "appropriate" education:

> Amendments enacted in Public Law 93-380 established basic due process procedures and protections, a pri-

ority for service to handicapped children who are not receiving an education, a prohibition on discrimination in testing, and *provision of educational services in the least restrictive environment appropriate to the needs of the handicapped child. . . .* that a goal of providing full educational opportunities would be established, including a timetable for delivery of full services to all handicapped children; and that a description of the facilities, personnel and services necessary to meet such a goal be included.

In order to carry these planning provisions into actual delivery of services, the Committee bill adopts provisions to assure the right to education for handicapped children, to set a date by which handicapped children and their parents will be assured that they in fact have a right to education, and to establish a process by which State and local educational agencies may be held accountable for providing educational services for all handicapped children. Thus, the Committee bill provides that a State, in order to be eligible for funding must have *a "right to education" policy* for all handicapped children, that all handicapped children aged three to eighteen will have available to them by September 1, 1978 *a free appropriate public education*, and that all handicapped children aged three to twenty-one will have available to them by September 1, 1980, *a free appropriate public education.* (Emphasis supplied).

It would appear from this Committee language that the Committee intended to use the term "free appropriate public education" as a short-cut term for the language in the 1974 Act relating to mainstreaming. The word "appropriate", in other words, refers to *where* the child is placed, not the type of services to be provided.

The Congressional floor debate on S. 6 consisted primarily of prepared statements which emphasized that the Act was to serve two purposes: assist states and local school districts in meeting their duty to guarantee equal opportunity to handicapped children, and also serve the

public interest by making many handicapped persons self-sufficient rather than wards of the state.

The "equal opportunity" standard should be looked at in the context of "equal access" to the educational system. The cases cited by the Congress during its debate on P.L. 94-142 are all "access" cases. The states and school districts involved in these cases were completely excluding handicapped children from participation in the education program. Nothing in the legislative history of the statute indicates that the Congress intended "equal opportunity" to require school districts to determine that any "educational shortfall," 483 F. Supp. at 534, in the words of District Judge Broderick, which might be determined to be related to the handicap of the child, must be corrected by the school district. That definition of "equal oportunity" is simply not justified under the words of the statute or its legislative history.

Once the handicapped child is provided access to the school system, he or she must then be provided services with the goal of achieving self-sufficiency. As District Judge Broderick stated with regard to Amy Rowley, the "evidence firmly establishes that Amy is receiving an 'adequate' education, since she performs better than the average child in her class and is advancing easily from grade to grade. . . ." *Id.* She, therefore, has certainly achieved the goal of "self-sufficiency."

But the courts below would have more. They argue that because Amy uses sign-language at home, because that is the preferred methodology of her parents, that she must be provided that service in the public schoolroom as well. That standard goes beyond both the "self-sufficiency" and the "equal opportunity" standard. There is nothing in the legislative history of P.L. 94-142 to indicate that a handicapped child has the absolute right to a methodology which her parents prefer, or which is the "best" which the "state of the art" has available. Learning styles vary

and, certainly, many non-handicapped children would do better in the public school system if the school system would adapt its teaching methodology to the individual needs of the student.

Given the concerns expressed by the Congress during debate on P.L. 94-142 on the question of the limited amount of money authorized by the law, and the likelihood of much less being appropriated, it is inconceivable that any reliance could be placed on the legislative history of the Act to support a proposition that Congress intended to require school districts to provide sufficient time, money, effort, etc. to assure that every handicapped child achieves his or her maximum potential or understands 100% of what transpires in the classroom.

If one looks at the prepared remarks of members of the respective committees, it can be seen that the matters with which they were concerned were basic equal access rights of handicapped children: "children are denied access to public schools because of lack of trained personnel because their children are viewed as an extra burden or for a variety of other reasons." 121 Cong. Rec. 23708.

Each statement mentions the several cases, such as *Mills* and *PARC*, which have upheld the right of handicapped children to a free appropriate public education. No statement defines "appropriate" or even suggests that the guarantee of an "appropriate" education would require more than "access" and the minimum amount of services to provide self-sufficiency, or in the case of Amy Rowley, to progress from grade to grade.

The phrase, "free appropriate public education", is defined in the Act as:

> . . . special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State education agency, (C) include an appropriate preschool, elementary or

> secondary school education in the State involved, and (D) are provided in conformity with the individualized education program. . . . 20 U.S.C. § 1401(18).

The definition of "special education" as included above is:

> . . . specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions. 20 U.S.C. § 1401(16).

As we have seen, the Senate Labor and Public Welfare Committee Report indicates in the discussion of the 1974 version of the Act that the word "appropriate" was intended to cover the concept of "mainstreaming" and "least restrictive environment" while the term "special education" or "special services" was intended to require school districts to provide an equal opportunity of access to courses of study and services which are offered to non-handicapped children but in order that handicapped children may take advantage of such courses and services—must be offered in a different manner through the use of special aids and educational techniques. For example, courses in physical education and arts and crafts, if offered to non-handicapped children, must also be offered to handicapped children, even though the courses may have to be altered in order to provide access for a particular child. However, once access is provided and the minimum service level is provided to meet the goal of progression from grade to grade, the obligation to provide more ceases.

Section 1401(16) of P.L. 94-142 uses the term "unique needs," which means that in order to provide "access" to the system, special or different services may have to be provided to the handicapped child. Given the fact that Amy can lip read and, in fact, is able to succeed very well with the use of the lip reading technique, together with the other services

provided to her by the school system, her "unique" needs have been accommodated. The statute, through the use of the term "unique" needs", is merely taking into account the difference between the needs of a handicapped child and the needs of a non-handicapped child. It is not requiring that *all* of the needs of the handicapped child be met.

The decision below is also violative of legislative intent in another respect. Both 20 U.S.C. § 1412(5) and its accompanying regulations, 34 C.F.R. § 300.550-556, mandate that handicapped children be educated in the least restrictive environment. Appellees, and the experts whose testimony they presented, adhere to a philosophy that all deaf children require the presence of a sign language interpreter in the classroom in order to achieve their full potential. Appellees' experts who had observed Amy Rowley did not testify at either the impartial hearing or in the proceeding below. Those who did testify never observed the student in class, and based their testimony on the premise that since she is deaf, she requires an interpreter. All the school personnel who had worked with this child, or had observed her performance, however, testified that she had performed very well, both academically and socially in her current program, and that the services of a sign-language interpreter would be unnecessary and perhaps detrimental. Despite this evidence, the court below, concluded that *every* deaf child fares better in class with an interpreter, and since Amy Rowley is deaf, an interpreter is required in this case.

Logically, any requirement that a handicapped child be placed in the least restrictive environment carries with it a first-hand evaluation of that child's performance, so that an assessment may be made of the child's abilities, weaknesses and needs. Amici submit that the conclusion of the court below neatly categorizing all deaf children cannot be upheld without seriously damaging one of the basic tenets of the legislation on review in this case. Such a

blanket philosophy of the educational needs of all deaf persons cannot serve as the criteria for the placement and the provision of services to an individual child in the least restrictive environment, since it contains a rigid rule as to what that environment must include. In addition, the rule runs contrary to the spirit of the act, since it *mandates* rather than excludes a restriction, a restriction which must to some degree single out the deaf child to classmates as being "different."

In summary, neither the terms of the statute, its legislative history nor its accompanying regulations support the holding of the court below. Because an adequate education is presumably provided to all children, Congress mandated that it be provided to handicapped children as well. In so doing, however, Congress did not intend, as the court below erroneously held, that a specific class of handicapped children must receive a certain service, wherever they are placed. Courts should not examine the philosophy of the education of the handicapped, but rather the individual child in the particular learning environment. The question to be asked is not whether there is any marked trend in educating children with a certain handicap, but whether this child in this program is receiving an adequate education, appropriate to her needs and abilities, in the least restrictive environment.

Judicial Restraint in Education Decision-making

Our nation's courts have long cautioned judicial restraint with regard to local educational affairs and have permitted educational officials a greater deal of discretion in making their decisions. Courts have recognized that education can function effectively only if school boards are granted broad authority to determine the subjects to be taught, the curriculum deemed most suitable, and the methods of teaching to be employed.

This Court emphasized in *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968), that:

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.

Earlier, in *Abington School District* v. *Schempp*, 374 U.S. 203, 300-301 (1963) (Brennan J., concurring), Justice Brennan had issued the following words of caution:

> We should heed Mr. Justice Jackson's caveat that any attempt by this Court to announce curricular standards would be "to decree a uniform, rigid and, if we are consistent, an unchanging standard for countless school boards representing and serving highly localized groups which not only differ from each other but which themselves from time to time change attitudes." Illinois ex rel. *McCollum* v. *Board of Education*, supra, [333 U.S.] at 237.

This deference to local control is a recognition of the varying wants and needs of the Nation's diverse and varied communities, each with its unique character, standards and sense of social importance of a variety of values. *Mercer* v. *Michigan State Board of Education*, 379 F. Supp. 580, 585 (E.D. Mich.), *aff'd. mem.*, 419 U.S. 1801 (1974).

Amici respectfully submit that the courts below based their decisions to mandate that an interpreter be provided on a bias in favor of a particular educational theory. This approach was not only contrary to traditional case law cautioning judicial restraint in education but, as stated previously, to some of the basic provisions and purposes of P.L. 94-142 itself.

As pointed out in the dissent of Judge Mansfield below, respondents' experts who had observed Amy Rowley did not testify either at the impartial hearing or in the district court proceeding. Those who did testify never observed this student in class, and based their testimony on the premise that since she is deaf, she requires an interpreter. All the school district personnel who had worked with this child or who had observed her performance, however, testified that she had performed very well, both academically and socially in her current program, and that the services of a sign language interpreter would be unnecessary and perhaps detrimental.

Despite this evidence, the district court concluded, in a simple syllogism, that since all the experts who testified stated that every deaf child fares better in class with an interpreter, and since Amy Rowley is deaf, an interpreter is required in this case. The district court then went on to conclude that if there was something unique about this child which would render these generalizations less applicable to her it was due in large part to "her superior intellectual and personal abilities for which she should not be penalized." 483 F. Supp. at 535.

Even conceding the correctness of both of these conclusions of the district court, the ultimate conclusion reached by the court is still a startling departure from traditional case law involving educational decision-making. In essence, it holds that a school district must provide a particular service because a particular educational theory which utilizes that service is now in vogue.

This conclusion is more startling when set against the general backdrop of P.L. 94-142, which requires that the *unique* needs of each individual handicapped child be assessed. The district court's conclusion, adopted by the Second Circuit, in effect turns this requirement on its head by starting with a general premise that all members of a certain class of handicapped children must receive a certain

service, and then stating that the school district has the burden of showing how this particular child is a unique member of her class.

Amici wish to emphasize that they do not dispute that P.L. 94-142 does grant the federal courts jurisdiction to review state and local agency decisions, to hear additional evidence and to base its decision on a preponderance of the evidence. We do submit, however, that nothing in that enactment or in previous case law requires that school officials follow what the courts perceive to be the best educational theory, so that a child who is already performing adequately may further develop his or her potential.

Further, it is the position of amici that the purpose of the individualized education program requirement is to assure that the district follow a procedure of individually assessing each child and using the expertise of the district's special education teachers, counselors, etc., develop a program which is designed for that individual child. The duty of the courts, in turn, is to examine the *process* followed by the school district, not the *substance* of the educational decisions which were made by the district. If the school district followed the procedures set out in the law and there is a rational basis for the decisions made by the district, those decisions should stand, even though there may be experts which disagree with the district's experts, and even though the court may have reached a different decision had it been called upon to make the initial recommendations.

The Department of Health, Education and Welfare, in its analysis of the final regulation under Section 504 of the Rehabilitation Act of 1975, which prohibits discrimination against qualified handicapped persons, states as follows:

> It is not the intention of the Department, except in extraordinary circumstances, to review the result of individual placement and other educational decisions, so long as the school district complies with the "process" requirements of this subpart (concerning identification and location, evaluation, and due process pro-

> cedures). However, the Department will place a high priority on investigating cases which may involve exclusion of a child from the education system or a pattern or practice of discriminatory placements or education. 42 Fed. Reg. No. 86, May 4, 1977, Appendix A.

That analysis should apply, as well, to the courts which are grappling with the question of whether a particular handicapped child has been offered an equal opportunity and a "free appropriate public education" under P.L. 94-142.

Examples of recent decisions which have cautioned or rejected the approach of mandating particular kinds of programs or services in cases involving educational issues may be found in the field of bilingual education.

In *Keyes* v. *School District No. 1, Denver, Colorado,* 521 F.2d 465 (10th Cir.), *cert. den.*, 423 U.S. 1066 (1976), the United States Court of Appeals for the Tenth Circuit rejected a plan adopted by the lower court as going "well beyond helping Hispanic school children to reach the proficiency in English necessary to learn other basic subjects." 521 F.2d at 482. That plan had included proposals extending to matters of educational philosophy and curriculum development. The Tenth Circuit stated that "[I]nstead of merely removing obstacles to effective desegregation, the court's order would impose upon school authorities a pervasive and detailed system for the education of minority children." *Id.*

In the present case much weight was attached by the district court to tests which indicated that Amy Rowley was capable of discriminating approximately 59 percent of what was spoken in class. The district court also found that with the use of the "total communication" teaching method, she could identify 100 percent of the words spoken to her. 483 F. Supp. at 532. In addition, the court held that her performance on achievement tests did not establish

that she was learning "all she would be learning if she were not deaf," and that her I.Q. "does not represent the full measure of her potential." 483 F. Supp. at 534-535.

As pointed out in the dissenting opinion of Judge Mansfield below, these statements are speculative at best and not supported by the testimony of persons who observed this child in the classroom. Evaluating the potential of any child is extremely difficult as is evaluating the effects of specific methods of educating handicapped children. *See* Kirp, Buss and Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 CAL. L. REV. 40, 47 (1974). The definition of a free appropriate public education formulated by the district court, however, not only assumes that this can be done but treats this definition as a guarantee that handicapped children must learn all that they would be learning if they were not handicapped. No such guarantee, we submit, exists in either the Act or in current regulations.

It should be noted that this guarantee concept has been implicitly rejected in the regulation governing accountability for the individualized education program. *See* 34 C.F.R. § 300.349. That regulation states, in part, that "the Act does not require that any agency, teacher or other person be held accountable if a child does not achieve the growth projected in the annual goals and objectives." The accompanying comment indicates that while agencies and teachers are not relieved from making good faith efforts in achieving the goals set forth in the IEP, the regulation was intended to "relieve concerns that the individualized education program constitutes a guarantee by the public agency and the teacher that a child will progress at a specified rate."

This regulation reflects an understanding of several basic problems. First, there is the uncertainty as to the effectiveness of various methods of classifying and educating handi-

capped children. As the Court of Appeals for the Seventh Circuit noted in *Anderson* v. *Thompson*, 658 F.2d 1205 (7th Cir. 1981), a case involving the right to obtain damages under P.L. 94-142:

> Moreover, in as new and undeveloped a field as special education, there is a need for flexibility and experimentation in programming for handicapped children. We take judicial notice of the fact that at the present time, problems of classification and treatment abound. Disagreements will arise and errors will be made. *Id.* at 1213.

More particularly, education of the deaf has been marked by centuries-old battles between methods of education and has remained highly controversial. *See generally*, Large, *Special Problems Of The Deaf Under The Education For All Handicapped Children Act of 1975*, 58 WASHINGTON UNIVERSITY LAW QUARTERLY 213, 229 (1980). Research comparing different methods is at best inconclusive, and no method has ever worked sufficiently well to receive uncritical acceptance. While the district court in this case cited the total communication method as being superior, that method has its weaknesses, especially when viewed in terms of the mainstreaming requirements of P.L. 94-142. Large, *Special Problems Of The Deaf*, *supra*, at 236-237.

Given the fact of the differences between children, the approach of the courts below could be potentially harmful to numerous deaf children, since it assumes that one program works well for all children possessing that handicap. Just as the district court recognized that I.Q. tests are not always correct indicators of a child's potential, *see* Smith and Knoff, *School Psychology and Special Education Students' Placement Decisions: I.Q. Still Tips The Scale*, 15 JOURNAL OF SPECIAL EDUCATION, 55, 62 (1981), it should have recognized that generalized statements concerning one teaching method could not supply a guarantee of an individual child's improved performance.

Second, the regulation is in line with recent case law from both New York and California dismissing actions for "educational malpractice." In each of these decisions the court emphasized the difficulties the judicial system would have in dealing with conflicting educational theories and with a guarantee of achieving minimum, let alone maximum, educational potential.

In *Donohue* v. *Copiague Union Free School District*, 64 A.D.2d 29 (1978), *aff'd.*, 47 N.Y.2d 440 (1979), the appellant entered Copiague Senior High School in September 1972 and graduated in June 1976. The thrust of his claim was that despite his receipt of a diploma, he lacked the basic ability to read and write on a level sufficient to enable him to complete job applications. Among other things, he alleged that the respondent school district "failed to provide adequate school facilities, teachers, administrators, psychologists, and other personnel trained to take the necessary steps in testing and evaluation processes insofar as [appellant] is concerned in order to ascertain the learning capacity, intelligence and intellectual absorption on the part of [appellant] . . . ."

In its decision, the Court of Appeals said:

> To entertain a cause of action for "educational malpractice" would require the courts not merely to make judgments as to the validity of broad educational policies—a course we have unalteringly eschewed in the past—but, more importantly, to sit in review of the day-to-day implementation of these policies. Recognition in the courts of this cause of action would constitute blatant interference with the responsibility for the administration of the public school system lodged by Constitution and statute in school administrative agencies . . . *Id.* at 444-445.

The issues raised in *Donohue* were also present in *Peter W.* v. *San Francisco Unified School District*, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976), in which a poorly educated

student alleged negligence on the part of his school district with respect to his education. Specifically, he alleged that the district negligently failed to apprehend his reading disabilities; assigned him to classes inappropriate to his reading level; allowed him to pass to subsequent grade levels knowing that he had not achieved the skills necessary to benefit from advanced grade levels' assigned him to classes in which the instructors were not competent to deal with him; and allowed him to graduate with a reading level lower than that required by law. *See* 60 Cal. App. 3d at 813, 131 Cal. Rptr. at 856.

Throughout its opinion, the court emphasized that the application of traditional tort law with its "duty of care" to such a new cause of action turned, in large part, upon considerations of public policy. In declining to extend this standard to the educational setting, the court stated that:

> Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might—and commonly does—have his own emphatic views on the subject. 60 Cal. App. 3d at 824, 131 Cal. Rptr. at 860-61.

As in the appellate division decision in the *Donohue* case, the court reasoned that since there were many factors outside the control of the school district which could influence a student's progress in school, there was simply no workable duty of care against which the school district's conduct could be measured. *See* 60 Cal. App. 3d at 824, 131 Cal. Rptr. at 860-861, at 64 A.D.2d at 39. The court also noted that since education today is the subject of such controversy and dissatisfaction, an opposite result would expose school districts to a countless number of real or imagined tort claims by students and their parents. *See* 60 Cal. App. 3d at 825, 131 Cal. Rptr. at 861.

At least one district court has utilized these cases in its analysis of P.L. 94-142. In *Loughran* v. *Flanders*, 470 F. Supp. 110 (D. Conn. 1979), the court held that this legislation did not serve as a basis for a private cause of action for damages. In so holding, the court stated that:

> A final factor to be considered is whether the purported cause of action is one traditionally relegated to state law, in an area basically the concern of the states. *Cort* v. *Ash*, supra at 78, 95 S. Ct. 2080. The plaintiff is essentially alleging that he is the victim of educational malpractice. The few reported cases on this type of claim have all arisen in a state forum. *See, e.g., Donohue* v. *Copiague* U Free Sch. Dist., 64 A.D.2d 29, 407 N.Y.S.2d 874 (1978) (held: no cause of action); *Peter W.* v. *San Francisco Unified Sch. Dist.*, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976) (Held: no cause of action); *Hoffman* v. *Board of Ed. of City of N.Y.*, 64 A.D.2d 369, 410 N.Y.2d 99 (1978) (held: cause of action); for misfeasance on part of school officials in failure to follow therapeutic timetable established by school psychologist).
>
> "The plaintiff has not cited nor can this Court find any federal case which has recognized this type of action. The claim for damages necessarily hinges upon questions of methodology and educational priorities, issues not appropriate for resolution by this Court, since they present a '. . . myriad of intractable economic, social and even philosophical problems.' *San Antonio School Dist.* v. *Rodriguez*, 411 U.S. 1, 42, 93 S. Ct. 1278, 1301, 36 L. Ed. 2d 16 (1972), quoting from *Dandridge* v. *Williams*, 397 U.S. 471, 487, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970). 470 F.Supp. at 115.

While respondents may argue that this is not an educational malpractice case nor one involving a claim for damages, amici contend that the approach and analysis utilized by the district court in this case in developing the definition of an appropriate education under P.L. 94-142 was based on the very assumptions which were rejected in the malpractice cases. This can readily be seen as examining several of that court's basic conclusions.

First, the district court held that while the evidence showed that Amy Rowley "performs better than the average child and is advancing easily from grade to grade," 483 F.Supp. at 534, such evidence did not establish that this child was learning "all she would be learning if she were not deaf," *id.*, and that her "educational shortfall" must be compared with that experienced by non-handicapped children. *Id.* How are federal courts to determine whether a handicapped child is learning all that he or she would be learning if not handicapped if our courts are uncertain why average children achieve or fail to achieve educational goals. This is precisely what the educational malpractice cases were all about. Instead of recognizing this fact, however, the district court proceeded to conclude in an almost off-hand manner, without receiving detailed evidence concerning her non-handicapped classmates, that these children were not achieving their educational goals because of controllable factors while Amy Rowley's failure to achieve was due solely to her handicap:

> While it is true, as defendants contend that no child understands 100% of what is taught in class, the failures of other children can be attributed either to lack of intellectual potential, in which case there is no shortfall relevant to the standard described above, or to a lack of interest or energy, factors which can be controlled and which it is the purpose of a school to develop. Amy's lack of understanding, by contrast, is inherent in her handicap and is precisely the kind of deficiency which the Act addresses in requiring that every handicapped child be given an appropriate education. 483 F.Supp. at 535.

Equally troublesome is the court's statement that the school district's emphasis on Amy Rowley's classroom performance ignored "the importance of comparing her performance to that of non-handicapped students of similar intellectual calibre and comparable energy and initiative." 483 F.Supp. at 534.

No individual comparisons, however, were ever made either by the court or by the impartial hearing officer or the Commissioner of Education. As Judge Mansfield indicated in his dissenting opinion below, this kind of process, along with that of determining the "educational shortfall" of children, would pose an impossible burden on school districts while subjecting children to a battery of tests. 632 F.2d at 945.

The problem with making such comparisons with non-handicapped students is that it leads directly to the difficulties expressed by the decisions in the *Donohue* and *Peter W.* cases. Aside from the practical problems previously mentioned concerning the measuring and comparing of students of "similar intellectual calibre" and "comparable energy and initiative," the simple fact is that there are too many factors outside the control of school districts which may influence a child's progress in school. If the definition formulated by the district court is adopted as the correct standard under P.L. 94-142, a major question for all future litigation, both at the state and federal level, will be to what extent the performance of handicapped and non-handicapped students is being influenced by such outside factors. If such assessments were difficult in the context of educational malpractice cases they will be even more difficult when hearing officers, state agencies and the courts must make them in determining an appropriate education under P.L. 94-142.

The district court's heavy reliance on expert testimony concerning trends in educating children with a particular handicapping condition also has enormous implications for future litigation. One need only set the same procedural stage as the present case and then apply it to a child with a different handicap. The entire focus of the administrative proceedings at the state level and of court review under 20 U.S.C. § 1415(c) would shift from an assessment of the individual child's needs and performance to an

examination of theories. The emphasis would be not on first-hand observation and evaluation of the child but on providing expert testimony concerning a class of children. Such experts would quarrel over which services and methods of instruction will best develop the potential of the child with that type of handicap. This is precisely the kind of judicial involvement in educational theory that our courts have always cautioned against, and it would expose our nation's school districts to numerous claims that handicapped children would fare better with a particular kind of service or method of instruction.

In formulating a definition of what constitutes an appropriate education under P.L. 94-142, this Court's decision will be setting a precedent for years to come, when technological advances may overtake such a legal definition and outstrip a school district's ability to provide needed education to all students. If, as the courts below suggested, a district must establish that a handicapped child is learning all she could be learning if she were not handicapped, or if a child is required to receive a service because all children with that handicap perform better with that service, the possibilities will be endless. There will be no limit to the amount and kinds of services which must be provided unless and until the court is satisfied that the particular child involved is performing up to his or her potential. All these demands will be made in the context of current fiscal belt-tightening on the part of federal and state government as well as local school districts.

Amici respectfully submit that pursuant to P.L. 94-142, courts should not examine the philosophy of educating the handicapped but rather the individual child in the particular learning environment. The question to be asked is not whether there is any marked trend in educating children with a certain handicap, but whether this child in this program is receiving an adequate education appropriate to her needs and abilities, in the least restrictive

environment. In the present case, we submit that this question must be answered in the affirmative.

Supreme Court Decisions Under Section 504 and Under the Developmental Disability Act

In the case of *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), the Supreme Court considered its first case brought under Section 504. The question in that case was how far an institution of higher education must go to accommodate the handicap of a deaf applicant to its nursing program. The 4th Circuit had ruled that Section 504 requires "affirmative conduct" on the part of Southeastern to modify its program to accommodate the disabilities of applicants, "even when such modifications become expensive."

The Department of Health, Education and Welfare, in its regulation implementing Section 504 requires "modifications to [a college's] academic requirements as are necessary to ensure that such requirements do not discriminate on the basis of handicap. . . ." 34 C.F.R. § 104.44 (a). The Supreme Court in *Davis* held that:

> [i]f these regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, they would do more than clarify the meaning of Section 504. Instead, they would constitute an unauthorized extension of the obligations imposed by that statute.
>
> The language and structure of the Rehabilitation Act of 1973 reflect a recognition by Congress of the distinction between the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps. *Id.* at 410.

The Court dismissed the contention of the Government which argued in its *amici* brief that Section 504 requires affirmative action. "[I]t is undisputed that respondent

could not participate in Southeastern's nursing program unless the standards were substantially lowered. Section 504 imposes no requirements upon an educational institution to lower or effect substantial modifications of standards to accommodate a handicapped person." *Id.* at 413.

What Amy Rowley is seeking here is not services to allow her to take advantage of the educational system. The relief requested is not in the category of providing equal opportunity or elimination of discrimination. It is affirmative action to enable her to achieve her maximum potential, and as such, should be judged by the standards set forth in *Davis,* which recognizes that there is a limit to the duty upon a federal recipient to accommodate the interests of handicapped persons.

On April 20, 1981, the United States Supreme Court handed down an opinion in the case of *Pennhurst State School and Hospital et al.* v. *Halderman et al.,* —— U.S. ——. 101 S.Ct. 1531 (1981), which, although interpreting a law which is distinguishable from P.L. 94-142, contains some important language relating to the interpretation of the intent of Congress in passing such laws.

Plaintiffs sought the closing of Pennsylvania's Pennhurst State School and Hospital, a facility for the care and treatment of the mentally retarded, and urged that "community living arrangements" be established for its residents. The district court held that conditions at Pennhurst violated the federal constitutional right to be provided with "minimally adequate habilitation" in the "least restrictive environment," and also found violations of the Equal Protection Clause, the Eighth Amendment and Section 504. Pennhurst was ordered closed and suitable "community living arrangements" provided for all Pennhurst residents. A Special Master was appointed to supervise the implementation of the order.

The court of appeals affirmed the appointment of a Special Master, but declined to reach the constitutional

claims, instead resting its order on its construction of the Developmentally Disabled Assistance and Bill of Rights Act. This Act was raised on the court's own initiative, none of the Plaintiffs having raised it.

The Court in Pennhurst notes that the Act in question was passed by the Congress pursuant to its Spending Power rather than under Section 5 of the Fourteenth Amendment. Thus, "the legitimacy of the Congress' power to legislate . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract'. . . . There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." —— U.S. at ——, 101 S.Ct. at 1539-40.

When the State of New York and the Hendrick Hudson Central School District accepted funding under P.L. 94-142 and the requirement of a "free appropriate education," they did not knowingly accept a requirement that they must provide all services, equipment, etc. to assure that each child achieves 100% of his or her "maximum potential."

The Supreme Court also noted in interpreting the intent of Congress that the extent of the financial burden created would be a relevant consideration in determining whether Congress implicitly mandated the relief sought by the plaintiffs.

> The fact that Congress granted to Pennsylvania only $1.6 million in 1976, a sum woefully inadequate to meet the enormous financial burden of providing "appropriate" treatment in the "least restrictive" setting, confirms that Congress must have had a limited purpose in enacting 6010 [the Bill of Rights]. When Congress does impose affirmative obligations on the States, it usually makes a far more substantial contribution to defray costs. . . . It defies common sense, in short, to suppose that Congress implicitly imposed this massive obligation on participating States.

> . . . The crucial inquiry, however, is not whether a State would knowingly undertake that obligation, but whether Congress spoke so clearly that we can fairly say that the State could make an informed choice. *Id.* at ——, 101 U.S. at 1543.

CONCLUSION

As states have taken on the duty to educate the students within their borders—at least to a minimum degree—the amount of effort differs depending upon the needs of individual students. However, schools cannot right all the wrongs of nature and society. Somewhere in the context of providing equal educational opportunity for all children, states and local school districts must also make hard decisions as to what will be taught and in what context. The courts are probably the worst forum in which to make such decisions and, in the absence of a clear violation of the law, should stay out of educational decisionmaking.

In a treatise arguing for equality of opportunity for the handicapped, Frederick J. Weintraub and Alan R. Abeson define "educational equality" as "equality of access to different resources to attain different individual goals." Weintraub and Abeson, *Appropriate Education for All Handicapped Children: A Growing Issue*, 23 Syracuse L. Review 1037, 1056 (1972). That is a good, balanced definition. However, the schools cannot be held accountable for *achieving* their set goals for handicapped children while not achieving goals set for non-handicapped children. Within the confines of limited resources, all that can be expected is that each group of children will have access to the educational system.

Education today is still primarily a state and local matter and since the educational needs of all children are substantial and the costs of meeting them even greater, hard decisions must be made at the state and local levels as to standards and priorities. These decisions must include what will be taught and in what context. The decision of the

court below, however, strives toward maximization of the potential of all handicapped children and mandates that all deaf children receive a certain service. Such a decision strikes at the very heart of educational decision-making at the state and local levels, and will place an enormous financial burden on local school districts. School districts should not, we submit, be held financially accountable for the achievement of the full potential of handicapped children when no such requirement exists for the non-handicapped. Variations in the maturity, abilities and family backgrounds of all children make this an impossible goal. All that should be required is the provision of an adequate education to all children in a setting which allows them to acquire academic expertise, social skills and moral values necessary to become members of society.

Recognition of the right of handicapped children to equal protection of law should not lead to a judicial definition of the nature of the educational program for all children with a particular handicapped condition based on a blanket philosophy of educational needs. To do so would shift very basic educational decision-making into a forum which the courts themselves have recognized to be inappropriate.

Respectfully submitted,

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No. 80-1002

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In The

Supreme Court of the United States

October Term 1981

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Petitioners,

– against –

AMY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY in their own right,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE NEW YORK STATE COMMISSION ON THE QUALITY OF CARE FOR THE MENTALLY DISABLED, PROTECTION AND ADVOCACY SYSTEM, AS AMICUS CURIAE

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INTEREST OF THE AMICUS

The Commission on the Quality Care for the Mentally Disabled (the "Commission) is an independent state agency within the Executive Department of the State of New York. It is designated by the Governor as the agency responsible for the establishment of a statewide system of protection and advocacy for developmentally disabled persons, as mandated by the Developmentally Disabled Assistance and Bill of Rights Act. 42 U.S.C. §§ 6001 et seq. The Commission devotes significant resources to the problems that developmentally disabled children confront in securing the "free appropriate public education" required under the Education for All Handicapped Children Act, 20 U.S.C. § 1401 et seq. (the "Act"). From its direct experience with the difficulties developmentally disabled persons face in all aspects of their lives, the Commission has come to realize that education is often the key factor in shaping their potential ability to become productive and contributing members

of society. Thus, the question of what is an "appropriate education" is of crucial significance to the Commission's protection and advocacy function, and to the children it serves.*

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* The Commission has received the consent of petitioners and respondents to file this brief. Their letters of consent are filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

The Act grants to handicapped children a "free appropriate public education": the same educational opportunity long enjoyed by the non-handicapped. This mandate is clear both from the language of the Act as well as from the legislative history. The suggestion in the dissent below, and repeated by petitioners here, that Congress intended to do no more for the handicapped child once he had reached "self-sufficiency" is wholly inconsistent with the language of the statute and its purpose. This statute was not intended to confine handicapped children to a life of packing small boxes on an assembly line; it was to give them the same chance to develop their abilities that other children have long enjoyed.

The purpose section of the Act expressly demonstrates Congress' intent to provide handicapped children with full equality of opportunity. Moreover, the relevant House and Senate reports explicitly rely on this Court's

decision in Brown v. Board of Education, 347 U.S. 483 (1954), as setting the standard of equal educational opportunity which Congress intended, through the Act, to make a reality for every handicapped child. Finally, the statements of individual congressmen, when considered in context, clearly indicate that it was not Congress' intent to enact an educational scheme merely to allow the handicapped child to reach a level of self-sufficiency. Rather these remarks demonstrate that it was the intent of Congress to allow and encourage the handicapped child to develop his full capabilities to the same extent as the non-handicapped.

The lower courts correctly discerned Congress' intent in formulating a definition of "appropriate education."

ARGUMENT

I. The Act is Intended to Provide Handicapped Children with the Same Educational Opportunities as Provided Non-Handicapped Children.

1. The Language of the Statute

The Act's very statement of purpose shows Congress' finding that (1) it is the lack of "appropriate educational services" which leads to lack of "full equality of educational opportunity"; (2) the lack of full equality of educational opportunity violates the guarantee of equal protection of the law; and (3) the essential purpose of the Act is "to assure equal protection of the law." In the purpose section of the Act, Congress made the following findings:

> (1) there are more than eight million handicapped children in the United States today:
>
> (2) the special educational needs of such children are not being fully met;

(3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

* * *

(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of the handicapped in order to assure equal protection of the Law. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 3(b), 89 Stat. 773, 774 (1975) (emphasis added).

The Act mandates that, to be eligible for funding, a state must file a plan showing that "a goal of providing full educational opportunity to all handicapped children" is established. 20 U.S.C. § 1412(2)(A)(emphasis added). The only vehicle set forth in the Act for a state to achieve such a goal is the provision of a free appropriate public educa-

tion.* See 20 U.S.C. § 1412(1). Thus, rather than looking towards a "self sufficiency" standard, the statutory scheme makes clear that a free appropriate public education is the means by which a full or equal educational opportunity is to be provided to handicapped children.

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* The dissent below claimed Judge Broderick's decision in the district court was premised on a "basic error" that the Act does not define "appropriate education." Rowley v. Board of Education, 632 F.2d 945, 951 (2d Cir. 1980). There was no such "basic error" in the lower court's decision, however. The Act defines the term "free appropriate public education," not "appropriate education." Thus, the Act states that:

> The term 'free appropriate public education' means special education and related services which * * *, (C) include[s] an appropriate preschool, elementary, or secondary school education in the State involved. 20 U.S.C. § 1401(18) (emphasis added).

The components of element (C) -- an appropriate preschool, elementary or secondary school education, the meaning of which is the main issue in the case -- are left completly undefined.

Clearly, full equality of educational opportunities can only be provided, as the district court concluded, by first comparing the educational opportunity offered to the handicapped child to that offered his non-handicapped classmate. Rowley v. Board of Education, 483 F. Supp. 528, 534 (S.D.N.Y. 1980), aff'd, 632 F.2d 945 (2d Cir. 1980). Since the Act unquestionably intends to provide handicapped children with such opportunities, it follows inescapably that Congress in drafting the Act intended a comparison* between educational opportunities provided the handicapped and the non-handicapped child in

---

* The Act's requirement of a comparison between educational opportunities afforded to handicapped and to non-handicapped children does not make it unworkable by any means. The federal courts, in implementing the mandate of Brown v. Board of Education, 347 U.S. 483 (1954), have utilized comparisons between the education received in white and non-white schools in order to test whether or not an equal educational opportunity is being provided by the school district. Bulluck v. Washington, 468 F.2d 1096, 1105 (D.C. Cir. 1972); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967).

determining whether such an education was being provided.*

2. The Committee Reports

The legislative history of the Act refutes the argument that Congress was "simply concerned," Rowley v. Board of Education, 632 F.2d 945, 952 (2d Cir. 1980), with enabling handicapped children to become self-sufficient and did not intend that a comparison be made between the educational opportunities offered the handicapped and non-handicapped child, in

---

* Congress, in enacting the Education for All Handicapped Children Act, was, in effect, mandating that states modify their educational curricula to accommodate handicapped children in order to receive funds under the Act. The instant case is, therefore, completely distinguishable from the problem faced by the Court in Southeastern Community College v. Davis, 442 U.S. 397 (1979). There the Court had to determine whether § 504 of the Rehabilitation Act of 1973 required affirmative action by an educational institution, which would lead to a lowering of standards, to accommodate the needs of a handicapped student. Indeed, the moving force behind the Act is the conviction that many handicapped children who receive appropriate educational services throughout their childhood will be able to attend institutions of higher learning without having to cause those institutions to lower their standards.

order that the handicapped child receive equal educational opportunities. Indeed, as the House Education and Labor Committee Report expressly stated, the goal of each child's educational plan is to allow the child "to achieve his or her maximum potential" -- clearly a goal greater than self-sufficiency. H. Rep. No. 332, 94th Cong., 1st Sess. 19 (1975) (emphasis added). And the Senate Labor and Public Welfare Committee Report stated that the purpose of the Act is to "assure that full educational opportunities are available to all handicapped children." S. Rep. No. 168, 94th Cong., 1st Sess. 3 (1975). Moreover, as is noted in the Senate Report, "[t]his Nation has long embraced a philosophy that the right to a free appropriate public education is basic to equal opportunity and is vital to secure the future and prosperity of our people * * * It is this Committee's belief that the Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped

children are provided equal educational opportunity." Id. at 9.

Congress thus recognized that the provision of an appropriate education meant providing the handicapped child with full educational opportunities. It would be bitterly ironic to now turn the Act on its head by stating that all that is required by an appropriate education is to make handicapped children self-sufficient. Congress intended no such thing.

The petitioners, advocates of an "adequacy" or "self-sufficiency" standard of appropriate education, present a simple, but flawed, argument. First, they assert that landmark cases having to do with education of the handicapped, e.g., Pennsylvania Association for Retarded Children ("P.A.R.C.") v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972) and Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972), concern themselves only with guaranteeing that a handicapped child receive

an education, whatever the type or quality. It is claimed that these cases do not speak in terms of comparing educational opportunities of the handicapped and the non-handicapped. Second, these advocates assert that since the Senate Committee Report cites P.A.R.C. and Mills, the Act does not require such a comparison.

Strangely absent from petitioners' brief, however, is any mention of Brown v. Board of Education, 347 U.S. 483 (1954). Yet in the Congressional Committee Reports, this case is recognized as the font of authority for providing equal educational opportunities to the handicapped:

> In 1954, the Supreme Court of the United States established the principle that all children be guaranteed equal educational opportunity. The Court stated: "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity * * * is a right

> which must be made available to all on equal terms." (Brown v. Board of Education). S. Rep. No. 168, 94th Cong., 1st Sess. 6 (1975) (ellipsis inserted by the Committee)

Indeed, what the P.A.R.C. and Mills courts were faced with were shocking statistics: "of the more than 8 million children (between birth and twenty-one years of age) with handicapping conditions requiring special education and related services, only 3.9 million such children are receiving an appropriate education. 1.75 million handicapped children are receiving no educational services at all, and 2.5 million handicapped children are receiving an inappropriate education." S. Rep. No. 162, 94th Cong., 1st Sess. 6 (1975).

Thus there is no conflict at all between decisions such as those in P.A.R.C. and Mills, which ordered that handicapped children who were being excluded from the publicly-supported educational system be provided with educational services forthwith, and a determination

that, under the terms of the Act, equal educational opportunities are mandated.

3. The Congressional Debates

In the dissent below, 632 F.2d at 952 & n.2, and in the petitioners brief, various excerpts from statements made on the floor of Congress are cited which, it is claimed, establish that Congress was not concerned with comparing the potential of handicapped children to those of the non-handicapped in order to ensure the provision of an appropriate education. Brief of Petitioners at 64-65. For example, the dissent below pointed to a statement of Senator Williams that the Act will mean that handicapped children "will not have to depend on subsistence payments from public funds." 632 F.2d at 952 n.2.

Nothing in that statement of Senator Williams or in any of the other excerpts from the legislative debates is in any way inconsistent with the fact that Congress intended to afford handicapped children an equal

footing as to their education. With respect to some handicapped children, obviously, the most that one could hope for is that they become "self-sufficient". But it was clearly not the intent of Congress to relegate all handicapped children to lives of menial employment which would merely provide self-sufficiency. The point is that with both the child who can never be expected fully to compensate for his handicap (e.g., the severely mentally retarded child) and the child who has a handicap for which he could compensate (e.g., many orthopedically impaired children) Congress intended that a comparison with non-handicapped children be made to ensure that a handicapped child is afforded the same opportunity as the non-handicapped child to reach his particular potential, whether it is life in a sheltered workshop or the Presidency of the United States.

This conclusion is obvious from of the statements made during the debates on this legislation. Senator Randolph, the chairman

of the Subcommittee on the Handicapped, noted that

> The Education for All Handicapped Children Act of 1975 promises handicapped children the educational opportunity that has long been considered the right of every other American child. 121 Cong. Rec. S37,410 (1975) (emphasis added).

Senator Randolph also pointed out that the Act calls for the submission by the state of a plan that assures "that a goal is established for providing full educational opportunities for all handicapped children." Id.

Senator Stafford, the ranking minority member of the Subcommittee, stated that

> This is the day that handicapped children and their parents can point to and say that this Congress -- their Congress -- recognized as a matter of national policy, the equal protection under the law that they have always deserved. Id. at S37,411 (emphasis added).

Senator Stafford also noted, "[w]e can all agree that all handicapped children should be receiving an education. We can all agree that that education should be equivalent, at least, to the one those children who are not handi-

capped receive." Id. at S19,483 (1975) (emphasis added).

Senator Williams, the Chairman of the Committee on Labor and Public Welfare, stated that:

> The Constitution provides that all people shall be treated equally, but we know that, while all youngsters have an equal right to education, those who live with handicaps have not been accorded this right. This measure fulfills the promise of the Constitution that there shall be equality of education for all people, and that handicapped children no longer will be left out. Id. at S37,413 (1975) (emphasis added).

The goal of equal educational opportunity is supported by the statements of many other Senators including Senator Taft:

> The educational problems in America will never be resolved until the quality of education for all children attains a level commensurate with the demands of life in our complex society and offers the opportunity for the fulfillment of the potential abilities of all children, especially our handicapped children. * * * The goal of this legislation is to raise the quality of education for millions of handicapped children to a new standard of excellence and equal opportunity never before envisioned. Id. at S37,412;

Senator Cranston:

> [T]he right to free appropriate public education has long been the right of certain children in this country between the ages of 5 and 17; but the right has not been extended universally in our country. Some 7.8 million children who fall within this age group are largely excluded from the educational opportunities that we give to our other children. They are chidren with physically and emotionally handicapping conditions. Id. at S19,502 (1975);

Senator Beall:

> I hope that our efforts will bring forth the kind of program assistance that the Federal Government must provide to insure free and equal educational opportunities for the handicapped. Id. at S19,506;

and Senator Schweiker:

> The Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity. Id. at S19,504.

Clearly, these statements support the conclusion that the Act is intended to provide each handicapped child with the educational opportunities that will permit him to reach his full potential on an equal basis with other children.

II. A Judicially Imposed "Self-Sufficiency" Standard to Define "Appropriate Education" Would Destroy the Intent of the Act.

The Commission's specific concern in this action arises from the view expressed in the dissent below that "the aim of the Act is to develop a handicapped child's self-sufficiency." 632 F.2d at 952. Such a "self-sufficiency" limitation on a handicapped child's educational opportunity represents a serious misreading of Congressional intent. Indeed, as this brief demonstrates supra, the intent of the legislation at issue was to enable handicapped children to have an "educational opportunity" equal to that afforded to non-handicapped peers. Thus, just as the goal of this country's educational system is to provide the opportunity for the non-handicapped child to achieve his intellectual potential, the goal for the handicapped child must be the same.

The self-sufficiency standard applied to Amy Rowley would deny her any benefit from the

Act, beyond what petitioners voluntarily see fit to provide, since it is already evident, as the dissent noted, that she "will become a productive member of society." 632 F.2d at 953.

More central to the Commission's concerns, however, is the harm such a standard would cause to the intellectually handicapped child. For these children, it is an easy solution to equate appropriate education with goal of self-sufficiency.* But it is a solution not envisioned by the legislature.

---

* Indeed, the spectre of a double standard for two classes of handicapped children -- the intellectually and the non-intellectually impaired -- is made explicit in the brief for the United States as Amicus Curiae, which states:

> These ["functioning member of society" and "self-sufficiency"] standards, although perhaps applicable in determining the appropriate educational program for children whose intellectual capacity is impaired by their handicap, are inconsistent with the legislative emphasis on equality of education * * * as applied to children whose intellectual capacity is not so impaired. Brief for the United States as Amicus Curiae at n.5.

Self-sufficiency for an intellectually impaired child may in fact be a legitimate goal, but only if that goal is developed through the process of preparing the "individualized education program" in consultation with the child's parents, as mandated by the Act. 20 U.S.C. § 1414(a)(3)(B)(5). The program must include, according to federal regulation, "a statement of annual goals." 45 C.F.R. § 121a.125. To have a "self-sufficiency" goal judicially imposed for every intellectually impaired child is to destroy the spirit and the purpose of this law.

III. The Lower Courts Properly Interpreted the Act to Effectuate Congress' Intent.

In formulating its definition of appropriate education, the district court correctly discerned the congressional intent to provide handicapped children with equal educational opportunities. Thus that court wrote:

> An "appropriate education" could mean an 'adequate' education -- that is, an education substantial

> enough to facilitate a child's progress from one grade to another and to enable him or her to earn a high school diploma. An "appropriate education" could also mean one which enables the handicapped child to achieve his or her full potential. Between those two extremes, however, is a standard which I conclude is more in keeping with the regulations, with the Equal Protection decisions which motivated the passage of the Act, and with common sense. This standard would require that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children. 483 F. Supp. at 534 (emphasis added).

Judge Broderick's rejection of a "full potential" standard is a reasonable interpretation of what "equal" means. Due to fiscal constraints and other factors, a non-handicapped child may not be afforded a complete opportunity to achieve his or her potential. Similarly, a school system need not go to every extreme to provide an appropriate education for the handicapped child. But both the district court and the court of appeals correctly held, as to Amy Rowley, that more was required to provide her with equal educational opportunity. The provision of a sign language

interpreter to Amy Rowley is completely in keeping with the accommodations to the handicapped mandated by the Act, and therefore, the judgment should be affirmed.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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No. 80-1002

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, AND THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Petitioners,

– against –

AMY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY in their own right,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF UNITED CEREBRAL PALSY ASSOCIATIONS, INC. and UNITED CEREBRAL PALSY OF NEW YORK CITY, INC., *AMICI CURIAE*

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No. 80-1002

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, AND THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Petitioners,

– against –

AMY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY in their own right,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF UNITED CEREBRAL PALSY ASSOCIATIONS, INC. and UNITED CEREBRAL PALSY OF NEW YORK CITY, INC., *AMICI CURIAE*

INTEREST OF AMICI CURIAE*

United Cerebral Palsy is a nationwide network of approximately 250 state and local voluntary agencies (UCP affiliates) which provides services, conducts public and professional education and advocacy programs, and supports research about cerebral palsy. The United Cerebral Palsy Associations, Inc.

* Letters of consent to the filing of this brief have been filed with the Clerk of the Court.

("UCPA") is the national organization, formed in 1949, to coordinate and assist the affiliates and their over one and a half million volunteers in carrying out these programs.

At the local level, UCP affiliates provide direct services to children and adults with cerebral palsy and their families, including when necessary, special education and related services. On the national level, UCPA serves in an advocacy role for the handicapped in governmental activities, encouraging legislation and federal, state and local programs to benefit those with cerebral palsy and other disabilities.

The express mission of UCP is to involve individuals with cerebral palsy and their families and those with similar service needs in the mainstream of society by assuring their ability to assume their rights as citizens and to receive services as needed. The assurance of an "appropriate education" as contemplated in the Education For All Handicapped Children Act, 20 U.S.C. §§1401 *et seq.* (the "Act"), is an integral part of that mission.

UCP of New York City, Inc. ("UCP/NYC") is the largest UCP affiliate in the State of New York, and has had substantial experience in dealing with the implementation of "appropriate education" under the Act, and in relation to New York State statutes and regulations. UCP/NYC is plaintiff in a major class action litigation involving the provision of appropriate education to approximately 90,000 handicapped students suffering from cerebral palsy and a wide spectrum of other disabilities. *United Cerebral Palsy* v. *Board of Education*, 3 Education of the Handicapped Law Reporter ("E.H.L.R.") 551: 251 (E.D.N.Y. 1979), *aff'd sub nom. Jose P.* v. *Ambach*, F. 2d (2d Cir. January 21, 1982). As such, UCP/NYC both has a direct, immediate interest in the standards for "appropriate education" under the Act at issue in this case, and is in a position to bring to the Court information on its implementation which may not be available from other sources.

STATEMENT

UCPA and UCP/NYC believe that the holding of the Courts below, declaring that Amy Rowley was entitled to the services of

a sign language interpreter as a part of her educational program in the petitioner school district, should be affirmed. In support of this position, UCPA and UCP/NYC join in those parts of the brief of *amici curiae Association for Retarded Citizens of the United States, et al.* that discuss the findings of fact below and that set forth a full analysis of the requirements of the Act and the obligations of the state and local school district in accepting funds thereunder.

UCPA and UCP/NYC respectfully disagree, however, with *amici Association for Retarded Citizens of The United States, et al.* insofar as they suggest that the standard of "appropriate education" that was expressly relied upon by the lower courts "is not a proper across-the-board standard under the Act." This brief is submitted to present the legal basis for UCP's separate views on this critical issue.

SUMMARY OF ARGUMENT

The definition of appropriate education set forth in §1401(18) of the Act incorporates state educational policies and federal substantive and procedural requirements. The federal courts which have been called upon to apply these general criteria to the particular needs of individual handicapped children have articulated and/or applied three specific standards for determining appropriate education: "maximum potential," "commensurate opportunity" and "self-sufficiency."

The "maximum potential" standard, though perhaps desirable in the abstract, could require such enormous expenditures that it cannot realistically be considered consistent with Congressional intent. The "self-sufficiency" standard is inadequate because it relates only to the needs of a limited number of severely disabled children, and provides no guidance whatsoever for the needs of the overwhelming majority of handicapped students covered by the Act, whose needs go beyond self-sufficiency.

The "commensurate opportunity" standard adopted by the courts below is the only one of the proferred approaches which is

consistent with the purposes of the Act and its legislative history. All of the federal Courts of Appeals and most of the District Courts which have considered these issues have adopted this standard or cited it with approval. Consideration of both the actual case law experience to date and implementation issues arising under the Act which might require judicial review in the future, show that the commensurate opportunity standard both assures reasonable fiscal prudence and is judicially manageable.

ARGUMENT

THE "COMMENSURATE OPPORTUNITY" STANDARD FOR DEFINING "APPROPRIATE EDUCATION," ADOPTED BY THE COURTS BELOW, IS THE ONLY STANDARD WHICH IS CONSISTENT WITH THE PURPOSES OF THE ACT AND ITS LEGISLATIVE HISTORY AND RELATES TO THE NEEDS OF ALL HANDICAPPED CHILDREN.

The key requirement of the Education of the Handicapped Act, 20 U.S.C. §1401 *et seq.*, as amended by the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, ("the Act") is that each state and local educational agency receiving federal grants thereunder, assure each handicapped child in the jurisdiction a "free appropriate public education." 20 U.S.C.§§1412(1), 1414(a)(1). Free appropriate public education ("FAPE") is specifically defined in 20 U.S.C. §1401(18) as follows:

> (18) The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate pre-school, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414 (a) (5) of this title.

See also 34 C.F.R. §300.4.

Except for the obligation to provide services "at public expense" (in contrast to prior practice in some states of requiring parents to pay some or all of the costs of educating their children in expensive private schools· *see, e.g., McMillan* v. *Board of Education*, 430 F. 2d 1145 (2d Cir. 1970); *Elliot* v. *Board of Education*, 64 Ill. App. 3d 229, 380 N.E.2d 1137 (1978)), this broad definition is not self-referent. Rather, it provides a comprehensive framework that draws upon a variety of criteria to combine substantive requirements and flexible particularity to cover the individual needs of millions of children suffering from hundreds of kinds of disabilities. Thus, §1401 (18) specifically incorporates by reference the minimum educational standards of the applicable state law and regulations,* uniform federal substantive requirements contained in the definitions of "special education," and "related services," and specific federal procedures for formulation of the "individualized education program."** The resulting combination of state educational policies, federal substantive standards, and individualized federal planning procedures, should in each case provide education fully "appropriate" to each child's needs.

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* The "standards of the state educational agency" to which §1401 (18)(B) refers would include both minimum standards applicable to regular public school programs in the state (such as teacher certification requirements) and, in addition, specific standards applicable to the needs of the handicapped which some states have enacted in accordance with local policies and educational approaches. (*See, e.g.,* New York State's regulations providing specific maximum class size and age range limitations for each major disability category. 8 N.Y.C.R.R. §200-1.4.)

** The federal definition of "special education" in §1401 (16), incorporated by reference in the definition of FAPE, provides substantive benchmarks requiring state and local education agencies to provide "specially designed instruction ... to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." The additional requirement for the provision of "related services" in §1401 (17) details further explicit substantive requirements for particular services "including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services...."

The reference in §1401(18) to conformity with the "individualized education program," incorporates by reference into FAPE the entire process of formulating an individualized education plan each year designed to respond to the child's particular needs (§1414(a)(5)), and also, by necessary implication, the

Because of the detailed substantive and procedural requirements of the Act, most disputes concerning the appropriateness of a particular child's education are resolved at local school district conferences, or in state level administrative hearings. Where resort to the courts has been necessary, judges have often been able to resolve disputes by applying express provisions of the Act, especially those specifying individualized planning and due process procedures. *See, e.g. Battle* v. *Pennsylvania*, 629 F. 2d 269 (3d Cir. 1980), *cert. denied sub nom. Scanlon* v. *Battle*, 101 S.Ct. 3123 (1981) (blanket policy limiting instructional year to 180 days held inconsistent with individualized process requirements of the Act), *Concerned Parents and Citizens For Continuing Education at Malcolm X* v. *New York City Board of Education*, 629 F. 2d 751 (2d Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981) (transfer of child from one site location to another is not a change in educational placement triggering due process requirements under the Act). At times, however, courts have been presented with issues which require them to render substantive decisions concerning the appropriateness under the Act of the education being offered in particular fact situations.

This kind of judicial scrutiny clearly was contemplated by Congress. Section 1415(e)(2) of the Act creates a private right of action in the federal district courts for any party aggrieved by the result of the state administrative proceedings, regardless of the amount in controversy. Departing from the usual "substantial evidence" standard for judicial review of administrative action

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testing and evaluation that must precede the design of a proper plan (§1412(5)C)) and the administrative hearings and other due process guarantees which may follow (§1415).

The highly limited interpretation of its responsibilities under the Act put forward here by petitioner New York State Education Department ("the content of that education is left to the states" Pet. 33) is inconsistent, on its face, with the definition of free appropriate public education in §1401 (18) which specifically adds to its reference to local state standards, additional substantive federal requirements for "free education," "special education," "related services," and individually designed education. Petitioner's further suggestion (Pet. 62-3) that "appropriate education in the Act refers only to "mainstreaming" requirements for placement in the "appropriate," least restrictive environment, further ignores the comprehensive, substantive definition of FAPE set forth in §1401(18).

(*see, e.g.*, Administrative Procedure Act, 5 U.S.C. §706(2)), §1415(e)(2) directs the federal district court to "hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, ... grant such relief as the court determines is appropriate."*

In this reviewing capacity the district courts have, of necessity, tended to develop judicial standards for evaluating the facts of individual cases in light of the statutory language, Congressional intent and well-considered holdings in analogous cases. *Cf.* Note, "Enforcing the Rights to an Appropriate Education: The Education for All Handicapped Children Act of 1975," 92 Harv. L. Rev. 1103, 1125 (1979).

In the five years that the Act has been in effect, only three such standards have been articulated and applied in decisions of the federal courts.** These three standards may be summarized as follows:

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* Consistent with the indication in the conference committee report, that the court in these cases "shall make an *independent decision based on a preponderance of the evidence*..." S. Conf. Rep. No. 455, 94th Cong., 1st Sess. at 50 (1975), *reprinted in* [1975] U.S. Code Cong. & Ad. News 1480, 1503 (emphasis added), the courts have uniformly interpreted §1415 to call for independent, *de novo* judicial review. *Anderson* v. *Thompson*, 495 F. Supp. 1256, 1260-61 (E.D. Wis. 1980), *aff'd*, F. 2d, 3 E.H.L.R. 553:105 (7th Cir. 1981); *Town of Burlington* v. *Dept. of Education*, 655 F. 2d 428 (1st Cir. 1981); *Tokarcik* v. *Forest Hills School District*, F. 2d, 3 E.H.L.R. 552:513, 521 (3d Cir. 1981); *Kruelle* v. *New Castle County School District*, 642 F. 2d 687, 692 (3d Cir. 1981); *Ladson* v. *Board of Education*, 3 E.H.L.R. 551:188, 189 (D.D.C. 1979).

** A fourth standard, one calling simply for "opening the doors of the regular classroom to those capable of entering and learning without special assistance" Note, 92 Harv. L. Rev. at 1125, which might be called a "minimum adequacy" standard or an equal "access" theory (Brief of *Amici Curiae* National School Boards Association, *et al.*, 8) is also conceivable.

No judge has advocated and no court has applied such a minimum adequacy standard, however, because it is obviously inconsistent with the explicit purposes of the Act to assure that handicapped children receive a "full educational opportunity" 20 U.S.C. §1401 (16). The "adequate education" standard mentioned and rejected out of hand by Judge Broderick in the District Court below would appear to fit into this category. *See* 483 F. Supp. at 534.

1. *Maximum potential.* "An appropriate education... mean[s] one which enables the handicapped child to achieve his or her full potential."

2. *Commensurate opportunity.* Appropriate education requires that "each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children."

3. *Self-sufficiency.* An appropriate education means "an education for each handicapped child that enables the child to be as free as reasonably possible from dependency on others, and would enable the child to become a productive member of society."

Each of these standards was considered by the courts below. Judge Broderick explicitly rejected the "maximum potential" standard, and specifically adopted the "commensurate opportunity standard", as defined above. 483 F. Supp. at 534. His approach was affirmed by the majority of the panel in the Second Circuit. However, Judge Mansfield, dissenting from the Second Circuit opinion, advocated the "self-sufficiency" standard, as defined above.* 632 F. 2d at 953 (as apparently do the petitioners in this case (Pet. 66)).

Amici curiae respectfully submit that the Court should affirm Judge Broderick's commensurate opportunity standard because, quite simply, it is the only one of the proferred approaches which is consistent with the purposes of the Act** and its legislative history, and is capable of general application. The maximum potential standard, though perhaps desirable in the abstract,

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* The self-sufficiency standard as defined by Judge Mansfield included an additional clause stating that an appropriate education also would "hopefully promote academic achievement by the child that would roughly approximate that of his or her nonhandicapped classmates." 632 F.2d at 953. The meaning of this clause in its context is difficult to comprehend. It seems more relevant to Judge Broderick's commensurate opportunity standard than to Judge Mansfield's attempt to define a standard consistent with his view that "[t]he aim of the Act is to develop a handicapped child's self-sufficiency" 632 F. 2d at 952.

** This standard would also appear to be consistent with, if not explicitly required by, the specific language of §1401(18)(C). That provision, in partially defining "appropriate education" in terms of "an appropriate pre-school, elementary, or secondary school education in the State involved" utilizes regular public school education as provided in the particular State as a comparative benchmark for evaluating the propriety of education for the handicapped.

could require such enormous expenditures if widely implemented that it cannot realistically be considered consistent with Congress's intent. The self-sufficiency standard is inadequate because it relates only to the needs of a limited number of disabled children, and provides no guidance whatsoever for the needs of the overwhelming majority of the handicapped students covered by the Act, whose needs go beyond self-sufficiency.

Significantly, not only the Second Circuit, but also the Third, and Eighth Circuits (which constitute all of the federal Courts of Appeals that have considered this question), as well as the overwhelming majority of the district courts – in cases holding for and against plaintiffs – have adopted or cited with approval, the commensurate opportunity standard. *See Springdale School District* v. *Grace,* 656 F. 2d 300, 305 (8th Cir. 1981) ("The *Rowley* standard provides the handicapped child with the opportunity to achieve her full potential but takes into account that such a task is equally fair and feasible only to the extent that such opportunity must be commensurate with the opportunity granted to nonhandicapped in the same system."; *Battle* v. *Pennsylvania,* 629 F. 2d at 277 ("Thus, the Act probably anticipates that, where possible, educational objectives for the handicapped should be set with reference to those objectives established for the nonhandicapped." (*Gladys J.* v. *Pearland Independent School District,* 520 F. Supp, 869, 875 (S.D. Tex. 1981); *Espino* v. *Besteiro,* 520 F. Supp. 905, 912-913 (S.D. Tex. 1981); *Pinkerton* v. *Moye,* 509 F. Supp. 107, 113 (W.D. Va. 1981); *Bales* v. *Clarke,* 523 F. Supp. 1366, 1370 (E.D. Va. 1981); *Hines* v. *Pitt County Board of Education,* 497 F. Supp. 403, 406 (E.D.N.C.1980).

Two district courts have adopted or referred to the maximum potential standard. *Age* v. *Bullitt County Public Schools,* 3 E.H.L.R. 551:505, 506 (W.D. Ky. 1980) ("The Court is persuaded that the intent of the Act is to furnish the optimum in the way of education to those to whom nature has dealt less than a full hand"); *DeWalt* v. *Burkholder,* 3 E.H.L.R. 551:550, 553 (E.D. Va. 1980) ("The Hampton Schools offer Christine the best hope for the future... [and] the most appropriate education.") Most judges, however, have rejected the maximum potential approach in favor of the commensurate opportunity standard largely because of considerations of fiscal prudence:

> An appropriate education is not synonymous with the best possible education. *Springdale School District* v. *Grace,* 494 F. Supp. 266, 272 (W.D. Ark. 1980). It is also not an education which enables a child to achieve his full potential: "even the best public schools lack the resources to enable every child to achieve his full potential." *Rowley* v. *Board of Education,* 483 F. Supp. 528, 534 (S.D.N.Y. 1980). Plaintiff's parents are seeking an ideal education for their child. Their aspirations are understandable, even admirable. But neither they, nor any other parents have the right under the law to write a prescription for an ideal education for their child and to have the prescription filled at public expense.

Bales v. *Clarke,* 523 F. Supp at 1370. *See also Pinkerton* v. *Moye,* 509 F. Supp at 113; *Rettig* v. *Kent City School District,* 3 E.H.L.R. 552:503 (N.D. Ohio 1981).

A number of courts have referred to "self-sufficiency" but no court has advocated it as a general standard because all appear to have recognized the critical fact, overlooked by Judge Mansfield in his dissent below, that self-sufficiency as a goal does not relate to all categories of handicapping conditions covered by the Act. Thus, in cases involving extremely low-functioning students such as the severely retarded student in *Campbell* v. *Talladega County Board of Education,* 518 F. Supp. 47 (N.D. Ala. 1981) and the multiply handicapped child in *Gladys J.* v. *Pearland, supra,* the courts have found it helpful to consider the self-sufficiency goal, but they specifically noted that self-sufficiency is a partial standard applicable only to some of the students covered by the Act.* *Campbell,* 518 F. Supp. at 54, *Gladys J.,* 523 F. Supp at 875.

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* Actually, "self-sufficiency" is not a valid general standard even for the severely disabled because for many very low-functioning children, self-sufficiency is not a realistic, attainable goal. Brown, *et al.,* "The Principle of Partial Participation and Individualized Adaptations in Educational Programs for Severely Handicapped Students," in 10 Curricula Strategies for Teaching Severely Handicapped Students Functional Skills in School and Non-School Environments (D. Baumgart, *et al.,* eds. 1980) Brown, *et al.,* "A Strategy for

Judge Mansfield's assumption that Congress's *exclusive* concern was to promote self-sufficiency for handicapped children, an assumption which has been adopted and urged by the petitioners herein (Pet. 66) simply is incorrect. Of course, Congress recognized the needs of many of the severely disabled to strive for self-sufficiency. But its primary purpose was to provide a statutory scheme firmly grounded in broad concepts of equal educational opportunity that would confer benefits on all categories of disabled children. The Third Circuit, analyzing in detail the legislative history on this point, concluded:

> The Education Act embodies a strong federal policy to provide an appropriate education for every handicapped child. Three interrelated purposes underlay its passage. First, Congress sought to secure by legislation the right to a publicly-supported equal educational opportunity which it perceived to be mandated by *Brown* v. *Board of Education,* and explicitly guaranteed with respect to the handicapped by two seminal federal cases, *Pennsylvania Ass'n for Retarded Children* v. *Pennsylvania* and *Mills* v. *Board of Education.* Second, Congress intended the provision of education services to increase the personal independence and enhance the productive capacities of handicapped citizens. Third, Congress acknowledged the need for an expanded federal fiscal role to aid state compliance with the court decisions and to assure protection for the rights of handicapped children.

Kruelle v. *New Castle County School District,* 642 F. 2d at 690–691. (footnotes omitted and emphasis added). *See also Battle* v. *Pennsylvania,* 629 F. 2d at 278–79.

Developing Chronological Age Appropriate and Functional Curricular Content for Severely Handicapped Adolescents and Young Adults," 13 J. Special Educ. 81 (1979); Sontag, Smith & Sailor, "The Severely/Profoundly Handicapped: Who Are They? Where Are We?" 1977 J. Special Educ. 5. To generalize an unattainable goal as a legal standard would tend to certify the failure of any child who could not achieve this goal. It also could prove even more fiscally imprudent than the maximum potential standard, if local school districts were to consider themselves mandated to do everything conceivably possible, at inordinate cost, to pursue unlikely possibilities for "self-sufficiency."

The Senate Committee Report specifically stated a "belief that the Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity." S. Rep. No. 168, 94th Cong., 1st Sess. 9 (1975), *reprinted in* [1975] U.S. Code Cong. & Ad. News 1425, 1433 ("the Senate Report"). The theme of extending to the handicapped the equal educational opportunity rights of *Brown* v. *Board of Education,* 347 U.S. 483, 493 (1954), articulated in regard to the handicapped in the landmark cases of *Pennsylvania Association for Retarded Children* v. *Pennsylvania,* 334 F. Supp. 1257 (E.D. Pa. 1971), *modified,* 343 F. Supp. 279 (1972), and *Mills* v. *Board of Education,* 348 F. Supp. 866 (D.D.C. 1972) is repeated throughout the Senate Report, *id.* at 6, 9, 17; H.R. Rep. No. 332, 94th Cong., 1st Sess. 3 (1975), ("the House Report"); and in the debates, *see, e.g.,* 121 Cong. Rec. 19485 (1975) (remarks of Sen. Williams); *id.* at 19504, (remarks of Sen. Schweiker); *id.* at 37410 (remarks of Sen. Randolph). This goal to "assure equal protection of the law" for handicapped children was specifically incorporated in the statutory statement of purpose adopted with the Act, Pub. L. No. 94-142, §3 (a), 89 Stat. 775 (1975).

The Congressional insistence on providing a "full educational opportunity to *all* handicapped children" 20 U.S.C. §1412(2)(A)(i) (emphasis added) reflected a Congressional concern with the complex, variegated needs of all the handicapped, which go well beyond "self-sufficiency." Representative Quie specifically articulated this understanding in the House debate:

> [A]ll handicapped children are not the same. Children often have unique problems. Not all blind children need the same special program; many can be educated in regular classrooms with some assistance from readers and special braille textbooks; others are trained in special segregated classrooms or institutions.... Also it is difficult to make a judgment simply on the basis of the word 'handicapped' because a deaf child may require far more services, specialized personnel, training, and equipment than a retarded child. A child with cerebral palsy may, in addition to the CP problems have hearing and visual problems; however, not all

CP children have all of these problems; many are gifted..."

121 Cong. Rec. 23707 (1975)*

Both the House and Senate Reports referred to estimates of approximately 6 to 8 million children who would be considered handicapped under the definitions in the Act; the majority of these children, suffering from disabilities such as speech impairment, emotional disturbance and learning disabilities, were "self-sufficient" but needed special education services to receive a meaningful education.**

* Some of the types of services beyond "self-sufficiency" which higher functioning students would be expected to need were spelled out in the report of the House Committee on Education and Labor, which emphasized "physical education, exercise, and participation in sports," "artistic and cultural programs" and "extracurricular activities... such as 4-H, young business clubs, production and selling." House Report at 9-10.

** House Report at 11, Senate Report at 8. The reports discussed statistics from the Bureau of the Education for the Handicapped estimating the prevalence of each major category of handicapping condition. These breakdowns show that the incidence of mild disabilities such as speech impairment, learning disability, and emotional disturbance was substantially higher than the incidence of severe disabling categories such as multiple handicaps and severe mental retardation, to which self-sufficiency concepts would be relevant:

	Prevalence	Number of Children 5 to 17 yrs.
Visually handicapped	0.1	51,800
Deaf	.75	38,900
Hard of hearing	.5	259,000
Speech handicapped	3.5	1,813,000
Crippled and other health impaired	.5	259,000
Emotionally disturbed	2.0	1,026,000
Mentally retarded	2.3	1,185,400
Learning disabilities	3.0	1,554,000
Multiple handicapped	.06	31,000
Total	12.035	6,218,200

(House Report at 11)

Senator Williams, Chairman of the Senate Committee on Labor and Public Welfare, and a prime sponsor of the bill, presented during the Senate debates a state-by-state summary of the number of children who were receiving an "inappropriate" education at the time. "Inappropriateness" was repeatedly defined in terms of "not receiving a public education designed to meet their needs" and not receiving "a meaningful public education." These findings referred to millions of unserved and under-served children from all disability categories. 121 Cong. Rec. 19486-19492. *See also, e.g., id.* at 19502 (remarks of Sen. Cranston); *id.* at 19504 (remarks of Sen. Mondale); *id.*, (remarks of Sen. Humphrey); *id.* at 23704 (remarks of Rep. Brademas)

The definition of "handicapped" included in §1401(1)* specifically incorporates the full range of disabilities and conclusively demonstrates Congress' intent to cover the needs of all the handicapped. The "self-sufficiency standard" relates only to a small fraction of the population included in the definition under the Act; clearly it is inconsistent with the Congressional intent.

The commensurate opportunity standard adopted by the courts below is the only interpretation of the "appropriate education" requirements of the Act advanced by any court or regulatory agency** that is broad enough to supply rules of decision for disputes involving handicapping conditions across the full spectrum of disabilities and yet is delimited enough to keep the results within the bounds of fiscal prudence. Actual experience with this standard not only in this case, but also in the other recent cases cited above shows that it is judicially manageable. The standard, while requiring special education geared to the individual child's needs, also is sensitive to the fiscal realities of a particular school district (*see Mills, supra,* 348 F. Supp. at 876) and reasonably permits a range of cost differentials – from a few dollars for supplementary large-type books for the mildly visually impaired to more expensive services which are required at least temporarily, for students like Amy Rowley***.

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* "The term 'handicapped children' means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services."

** HEW regulations implementing §504 of the Rehabilitation Act of 1973, 29 USC. §794, cited below at 483 F. Supp. 533, define appropriate education as "regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met." 45 C.F.R. §84.33(b)(1), recodified as 34 C.F.R. §104.33(b)(1). Regulations issued under one statute are, of course, relevant to the interpretation of another closely connected statute. Note also that in this situation, the regulations under the Handicapped Act in effect at the time of the District Court decision below explicitly required that each state's annual plan include an assurance that the program be operated in accordance with the 504 Regulations. *See* 45 C.F.R. §121a.150 (1979).

*** The average costs experienced by school boards throughout the country in implementing the appropriate education requirements of the Act (under the generally prevalent commensurate opportunity standard) appear to be well within the range anticipated by Congress at the time of the passage of the Act.

Most of the petitioners' criticism of the commensurate opportunity standard is actually a misdirected attack on the "maximum potential" standard that was already rejected by the courts below*. The petitioners' only direct criticism of the commensurate opportunity standard focuses on the alleged difficulty of measuring the "potential and shortfall from potential of the handicapped and non-handicapped children in a given population." (Pet. 70). On the facts of the present case, Judge Broderick determined, and the Court of Appeals agreed, that the record presented sufficient objective measures (achievement, I.Q., and auditory speech discrimination tests) to permit a quantitative expression of Amy's shortfall as compared with opportunities available to her peers. It may be that such quantitative measures may not be available or may be difficult to apply in other cases. But invocation of the commensurate opportunity standard need not be (and, indeed, has not been – see cases cited *supra* at 9) dependent upon the availability of specific quantitative measurements.**

The Congressional reports and debates repeatedly cited figures anticipating that the cost of educating a handicapped child, on average, would be 1.9 times the cost of educating the non-handicapped. *See, e.g.*, House Report, at 12; *see also* 121 Cong Rec. 23703 (remarks of Rep. Brademas); *id.* at 23706 (remarks of Rep. Perkins); *id.* at 37418 (remarks of Sen. Biden); *id.* at 37420 (remarks of Sen. Hathaway). The latest available figures show that in 1980, the average nationwide *per capita* supplemental cost for special education was $1900 (U.S. Dept. of Education, U.S. Office of Special Education and Rehabilitation Services, "Second Annual Report to Congress on Implementation of Public Law 94-142; The Education for All Handicapped Children Act," p. 20, Table 1.1 (1980)). This $1900 supplement, considered in relation to the average nationwide *per capita* expenditure for non-handicapped children in 1980 of $2,230 (National Center for Educational Statistics, U.S. Dept. of Education, "Statistics of Public School Systems, Fall 1980" (Early Release), p. 5) represents a cost ratio of 1.85, slightly below the ratio anticipated by the Congress.

* *See, e.g.*, Pet. 47 ("scheme of unlimited liability"); *id.* at 65, 72 ("opportunity for full potential"). *See also* Brief of *Amici Curiae*, National School Boards Association, *et al.*, 9, 24, 26.

** Although some language in the District Court decision below might be read to imply that quantitative measurement is a *sine que non* for application of the commensurate opportunity standard in all cases, such statements were clearly *dicta*, which was not necessary for the holding in this case, and was not incorporated in the Second Circuit's affirmance.

Without reference to quantitative testing measurements, the commensurate opportunity standard clearly incorporates important comparative benchmarks for judicial review. For example, the standard is directly relevant to the following specific issues which have arisen in recent years in administrative hearings and court cases in which *amici curiae* have been involved:

* *Hours of instruction.* In New York State, all non-handicapped children at the elementary school level receive a minimum of five hours of instruction per day. But some programs for handicapped children provide only three or four hours of instruction per day.

* *Delays in placement.* Non-handicapped students newly enrolling in public schools are generally placed in specific class assignments on the first day of a new term or very shortly thereafter. In many cases, however, handicapped children are not placed until months after school opens, even if all their tests and evaluations have been fully completed.

* *Curriculum standards.* Curriculum standards for self-contained special education programs sometimes are maintained on a simplified, low-functioning level, even though many children assigned to these classes are capable of absorbing the same level of curriculum materials as non-handicapped (in some cases, of course, with supplemental instructional equipment or aids).

* *Enrichment activities.* Handicapped students are often excluded from participation in basic school enrichment activities such as assembly programs, library instruction, and after-school clubs and activities.

In each of these situations, a board of education would be required, under the commensurate opportunity standard, to explain practices which deny to handicapped children specific opportunities that the district makes available to the non-handicapped. Although in come cases, proferred justifications will need to be considered (as, for example, whether an "instructional lunch" period may reasonably be substituted for classroom instruction time), the comparative perspective of commensurate opportunity

provides a concrete framework for judicial review*, a framework which clearly is lacking in self-sufficiency, or any other standard which has been proposed. Case law precedents emerging under the standard, both in the clear-cut situations like those listed above, and from more complex cases of children with unusual special needs as in *Espino, supra,* will further enable the courts, where necessary, to assure the provision of an "appropriate education," consistent with the purposes of the Act, which is tailored to the individual needs of each child.

In short, the commensurate opportunity standard adopted by the courts below is the only meaningful and effective standard for judicial review which has been presented to the Court.

CONCLUSION

For all the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

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* In most situations where these issues have arisen to date, they have been settled by negotiations between the parties or at administrative hearings, primarily through application of a perhaps unstated, but usually implicit, commensurate opportunity approach. *See, e.g., Jose P* v. *Ambach* 3 E.H.L.R. 551:245, 3 E.H.L.R. 551:412 (E.D.N.Y. 1979); *United Cerebral Palsy of New York* v. *Board of Education,* 3 E.H.L.R. 551:251 (E.D.N.Y. 1979), *consolidated appeals aff'd,* F. 2d (2d Cir. January 21, 1982). It would seem, in fact, that the very clarity and ease of applicability of the commensurate opportunity standard promotes settlement and administrative resolution of these issues and tends to limit the number of cases brought to the courts under §1415(e)(2).

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No. 80-1002

In the Supreme Court of the United States

OCTOBER TERM, 1981

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, AND THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, PETITIONERS

v.

AMY ROWLEY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether an individualized education program devised for a particular handicapped child satisfies the requirements of the Education of the Handicapped Act solely by virtue of the fact that it does not conflict with any express provision of the relevant state plan submitted to the Secretary of Education under 20 U.S.C. 1413.

2. Whether the district court properly determined by a preponderance of the evidence that sign-language interpreter services should be included in the "free appropriate public education" to be provided to respondent Amy Rowley under the Education of the Handicapped Act.

3. Whether the district court had jurisdiction to grant injunctive relief extending beyond the school year covered by the individualized education program for which respondents sought judicial review.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1002

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, AND THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, PETITIONERS

v.

AMY ROWLEY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This is the first case under the Education of the Handicapped Act, 20 U.S.C. 1401 *et seq.*, to be heard on the merits by this Court. At the invitation of the Court, the United States filed a brief as amicus curiae at the petition stage.

The United States has a substantial interest in ensuring that federal funds distributed under the Education of the Handicapped Act are administered in a manner consistent with the terms of the Act, and thus has an interest in the questions of federal statutory interpretation involved in this case. In addition, the Department of Justice's litigative interests may be affected by the outcome of this case. First, under 20 U.S.C. (Supp.

III) 1234c(e)(2), the Secretary of Education [1] may refer to the Attorney General for enforcement any final order issued by the Education Appeal Board upon a determination that a recipient of funds under the Act has failed to comply with any of the Act's requirements. Second, under Pub. L. No. 96-247, Section 3, 94 Stat. 350 (to be codified at 42 U.S.C. 1997a(a)), the Attorney General is responsible for ensuring to institutionalized persons the full enjoyment of their rights, privileges and immunities under the Constitution and laws of the United States. To the extent that handicapped children are institutionalized, these rights include rights under the Education of the Handicapped Act.

STATEMENT

1. The State of New York receives federal funds under Part B of the Education of the Handicapped Act, 20 U.S.C. 1401, 1411 *et seq.*[2] As a statutorily-required condition of receiving these funds, New York has agreed to make available a "free appropriate public education" for all school-age handicapped children in the State, and has filed with the Secretary of Education a state plan describing the way in which that obligation will be fulfilled. 20 U.S.C. 1412(1), (2)(B), 1413.

Under the Act, each state, upon appropriate application (20 U.S.C. 1414) and a determination that the statutory eligibility requirements are satisfied (20 U.S.C. 1412), receives a federal grant which is directly proportional to the number of handicapped children, aged 3 to 21, receiving special education in that state (20 U.S.C. 1411(a)(1), (g)). Each state's grant must be allocated

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[1] In Section 301(a)(1) and (a)(2)(H) of the Department of Education Organization Act, 20 U.S.C. (Supp. III) 3441(a)(1) and (a)(2)(H), Congress transferred the administration of the Education of the Handicapped Act from the Commissioner of Education to the Secretary of Education.

[2] We are advised by the Department of Education that all states except New Mexico receive federal funds under this part of the Act.

among its local districts according to the number of such handicapped children in each such district (20 U.S.C. 1411(d)).[3]

At the local level, a public education authority (usually the local school district) must prepare an annual "individualized education program" for each handicapped child within its jurisdiction. 20 U.S.C. 1414(a)(5); see also 20 U.S.C. 1401(8), (22). This program, also known as an IEP, is a written statement describing the specially designed instruction and services that the school district intends to provide to meet the unique needs of the particular handicapped child involved. See 20 U.S.C. 1401(19).

2. Respondent Amy Rowley is a deaf child enrolled at a public school within the Hendrick Hudson Central School District in Westchester County, New York. In December 1978, Amy's parents, also respondents in this Court, challenged the school district's failure to provide for a sign-language interpreter in the IEP prepared for Amy for the academic year 1978-1979, during which she was in the first grade. When the school district's Committee on the Handicapped refused to modify the IEP, the Rowleys sought and obtained administrative review under 20 U.S.C. 1415(b)(2) and (c). The school district's refusal to provide a sign-language interpreter was sustained first by an impartial hearing officer within the school district and then by the petitioner State

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[3] We are advised by the Department of Education that, for the fiscal year ending September 30, 1981, the State of New York received slightly more than $45 million under Part B of the Act, and that the local petitioner received approximately $27,000 for its approximately 145 eligible children. The federal grants are not designed to underwrite the total cost of providing appropriate educational services to handicapped children within each State; rather, the federal funds are intended to supplement state funds earmarked for this purpose. See 20 U.S.C. 1413(a)(9)(B). Neither the evidence in this case nor the records of the Department of Education indicate the average cost per eligible child of complying with the Act.

Commissioner of Education (Pet. App. F-1 to F-25, E-1 to E-6). Respondents then brought this lawsuit in the United States District Court for the Southern District of New York, seeking judicial review of those administrative decisions in accordance with 20 U.S.C. 1415(e)(2). They contended that the school district's failure to provide a sign-language interpreter for Amy denied her the "free appropriate public education" to which she is entitled under the Act.

The district court did not hear evidence in the case until September and October 1979, when the 1979-1980 academic year had already begun and Amy had advanced to the second grade (Pet. App. B-1). At the time of trial, the required IEP had not yet been prepared for Amy for the new academic year (*id.* at D-3). Petitioner, the New York Commissioner of Education, argued that respondents' request for injunctive relief had become moot with the expiration of the 1978-1979 academic year and that the district court lacked jurisdiction to award injunctive relief for 1979-1980 or any subsequent academic year until an IEP had been prepared for that year and available avenues of administrative review had been exhausted. The district court rejected this position on the ground that the alleged inadequacy in Amy's IEP for 1978-1979 was "capable of repetition, yet evading review" and therefore "call[ed] for the invocation of a recognized exception to the mootness doctrine" (*ibid.*). The court concluded that it retained jurisdiction over respondents' challenge to the 1978-1979 IEP and that, under 20 U.S.C. 1415(e)(2), it was "empowered to grant any 'appropriate' relief, * * * which would include injunctive relief extending beyond the school year at issue" (*ibid.*).

Turning to the merits, the district court found (Pet. App. C-2 to C-9) that respondent Amy Rowley is a deaf child with some residual hearing ability. Her residual hearing is particularly good in the lower frequencies, where vowel sounds are distinguished. She is an ex-

cellent lipreader. Amy's parents are also deaf. They have raised Amy through the use of "total communication"—a relatively new system of education for the deaf involving the simultaneous mouthing and signing of words, as well as the use of amplification, touching, and visual cues.

During the 1977-1978 academic year, when Amy was in kindergarten, the school district provided her with an FM wireless hearing aid and, in addition, conducted a two-week experiment with a full-time sign-language interpreter. At the conclusion of this trial period, the interpreter determined that Amy did not need his services for the kindergarten class. For the 1978-1979 academic year, the school district's Committee on the Handicapped recommended that Amy be provided with (a) continued use of the FM wireless hearing aid; (b) tutoring services for one class hour daily; and (c) the services of a speech therapist for three hour-long sessions each week. The Committee decided that Amy did not need the services of a sign-language interpreter.

By all accounts, Amy is a bright, well-adjusted child who interacts well with her classmates and teachers and is successful in her studies. Her achievement test scores are above the class median, and she has an IQ of 122. The district court found (Pet. App. C-7 to C-8, C-20 to C-21 n.6), however, on the basis of auditory speech discrimination tests given under various conditions, that, when Amy uses only her hearing aid and her lipreading ability under conditions most closely approximating the actual classroom setting, she can identify only 59% of the words spoken to her, whereas when she uses the "total communication" method, including a sign-language interpreter, she can identify 100% of the words addressed to her. The court therefore determined (*id.* at C-8 to C-9) that Amy "is not learning as much, or performing as well academically, as she would without her handicap." The court accepted petitioners' evidence that "an interpreter is less necessary for the transmission of mechanical skills in the early grades than for the increasingly academic instruction of higher grades," but it found nevertheless that

"anything missed in the classroom early in the learning process will have far reaching consequences" (*id.* at C-9). Finally, the district court found that "an interpreter could be integrated into the classroom in a way which will not disrupt the class or adversely affect Amy's social interaction" (*ibid.*).

Under the Education of the Handicapped Act, as interpreted by the district court, "each handicapped child [must] be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children" (Pet. App. C-11). Focusing on the testimony of the principal at Amy's school to the effect that "only [Amy's] academic failure would convince the school district that she needed the services of an interpreter" (*id.* at C-12), the court ruled that petitioners applied an incorrect legal standard in determining that the services of a sign-language interpreter were not an essential part of Amy's IEP. The court stated that petitioners improperly ignored "the importance of comparing [Amy's] performance to that of non-handicapped students of similar intellectual calibre and comparable energy and initiative" (*id.* at C-13). Because of the deficiencies in Amy's understanding as revealed by the speech discrimination tests mentioned above, the court concluded that, without a sign-language interpreter, Amy falls farther short of her educational potential than do her peers.

The court referred to the testimony and affidavits of respondents' experts as additional support for the inferences drawn from the speech test results. The experts stated, largely without contradiction, that "there is a marked trend towards the use of total communication in the education of the deaf—a trend supported by studies showing the greater degree of success of students brought up in deaf households using total communication" (Pet. App. C-16). The court commented that, to the extent Amy has managed to make academic progress without the assistance of a sign-language interpreter, her success is attributable in large measure to her superior abilities

and should not be permitted to obscure the critical fact that the IEP designed for her by petitioners provides her with less opportunity to reach her potential than is offered to her non-handicapped classmates. The district court therefore ordered petitioners to provide Amy with the services of a sign-language interpreter "during any school period in which academic subjects are taught" (*id.* at B-1).

3. A divided panel of the court of appeals affirmed in a per curiam opinion (Pet. App. A-1 to A-24). The court ruled that the district court's findings of fact were not clearly erroneous and that its conclusions of law were correct (*id.* at A-5). Accordingly, the court relied primarily on the district court's detailed opinion, stressing in particular its agreement with the finding that "Amy misses a substantial part of what goes on in her classroom" and needs a sign-language interpreter in order to bring her educational opportunity up to the level of the opportunity offered to her non-handicapped classmates (*id.* at A-6). The court concluded by emphasizing that this case is not a class action and that the decision rests completely on evidence concerning "a particular child, her atypical family, her upbringing and training since birth, and her classroom experience" (*id.* at A-7). As a consequence of the court of appeals' affirmance of the district court's order, petitioners provided Amy Rowley with the services of a sign-language interpreter for the 1980-1981 academic year.

Judge Mansfield dissented (Pet. App. A-8 to A-24), expressing the view that the district court's interpretation of "free appropriate public education" was derived improperly from a regulation promulgated under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. (Supp. III) 794, and deferred insufficiently to the views of state and local authorities regarding the content of Amy's IEP. In Judge Mansfield's opinion, Congress did not seek, in the Education of the Handicapped Act, to ensure that each handicapped child have the same opportunity to reach his potential as is afforded to non-handicapped children.

Rather, Congress was concerned simply with providing "an education for each handicapped child that would enable the child to be as free as reasonably possible from dependency on others, would enable the child to become a productive member of society, and would hopefully promote academic achievement by the child that would roughly approximate that of his or her nonhandicapped classmates" (Pet. App. A-19).

SUMMARY OF ARGUMENT

As a condition of the grant of federal funds under the Education of the Handicapped Act, the State of New York has agreed to make available a "free appropriate public education" to all of its handicapped children. In determining whether respondent Amy Rowley is entitled to the services of a sign-language interpreter as part of the "free appropriate public education" due her under the Act, the district court properly concluded that an "appropriate education" is one which provides the handicapped child with the same opportunity to achieve his or her full potential as is given to his or her non-handicapped peers. The standard articulated by the district court, and adopted by the court of appeals in affirming that court's judgment, is fully consistent with the language and legislative history of the Act and with applicable regulations. Applying that standard to the facts of this case, the district court properly determined, by a preponderance of the evidence (see 20 U.S.C. 1415(e)(2)), that Amy Rowley's individualized education program must include provision for the services of a sign-language interpreter, even though the state plan under which it was prepared does not expressly require such services. Moreover, having made that determination, the district court had jurisdiction to grant injunctive relief extending beyond the school year covered by the IEP for which respondents sought judicial review, since otherwise the deficiencies in the IEP would be "capable of repetition, yet evading review."

ARGUMENT

I

AN INDIVIDUALIZED EDUCATION PROGRAM DEVISED FOR A PARTICULAR HANDICAPPED CHILD DOES NOT SATISFY THE REQUIREMENTS OF THE EDUCATION OF THE HANDICAPPED ACT SOLELY BY VIRTUE OF THE FACT THAT IT DOES NOT CONFLICT WITH ANY EXPRESS PROVISION OF THE RELEVANT STATE PLAN SUBMITTED TO THE SECRETARY OF EDUCATION UNDER 20 U.S.C. 1413

Petitioners contend (Br. 28-52) that the district court should have dismissed respondents' complaint because Amy Rowley's individualized education program conformed with New York's state plan submitted under 20 U.S.C. 1413. Their principal argument in support of this assertion was not presented to the lower courts, but is based on a decision of this Court rendered after the filing of the petition for a writ of certiorari in this case.

Relying on *Pennhurst State School and Hospital* v. *Halderman*, No. 79-1404 (Apr. 20, 1981), petitioners assert (Br. 31) that the Education of the Handicapped Act "does not create a substantive right to free appropriate public education on behalf of the individual plaintiffs." Petitioners concede that Congress may impose conditions on the disbursement of federal funds (Br. 32), and that the Education of the Handicapped Act does require states receiving funds under the Act to make available a free appropriate public education for all handicapped children as a condition for the receipt of such funds (Br. 33). However, petitioners contend (*ibid.*) that states accepting funds under the Act neither "undertake to provide a particular (i.e., 'appropriate') method or methods of educating handicapped children" nor "consent to a procedure whereby the courts, under the review power of the Act, * * * ultimately direct the states as to what education [is] appropriate, on a case by case basis." Rather, petitioners maintain (Br. 33-36), the Act merely

requires that the state devise a general, state-wide plan for educating its handicapped children and obtain the Secretary of Education's approval of that plan, leaving to the state the decision as to what constitutes an "appropriate" education for each individual handicapped child.

In *Pennhurst*, this Court held that Section 6010 of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. 6000 *et seq.*, creates no enforceable rights and obligations. The Court noted (slip op. 19) that Section 6010 "in no way suggests that the grant of federal funds is 'conditioned' on a state funding the rights described therein," and it further observed that the statute does not authorize withholding of funds for failure to comply with that section. By contrast, the Education of the Handicapped Act specifically conditions a state's eligibility for federal funding on its having undertaken to afford all handicapped children the right to a "free appropriate public education." See 20 U.S.C. 1412(1), 1412(2)(B). Payments to the state may be withheld upon a finding that the state has failed to fulfill this obligation. See 20 U.S.C. 1416(a)(1). In addition, the parent or guardian of a handicapped child may seek to enforce the child's rights under the Act through administrative procedures required to be established by the recipient states under 20 U.S.C. 1415.

Moreover, unlike the Developmentally Disabled Assistance and Bill of Rights Act of 1975, the Education of the Handicapped Act explicitly creates a private right of action whereby the parent or guardian may seek to vindicate the child's rights under the Act in federal court. See 20 U.S.C. 1415(e)(2). Contrary to petitioners' assertion (Br. 51), the scope of administrative and judicial review is not limited to resolution of "questions over procedural regularity, such as procedures to determine correct diagnosis and correct classification as a handicapped child," but rather encompasses "any matter relating to * * * the provision of a free appropriate

public education to [a handicapped] child." 20 U.S.C. 1415(b)(1)(E).

Thus, Congress has made available federal court review of a state's determination as to the "free appropriate public education" to be afforded a particular handicapped child. In accepting federal funds under the Act, the State of New York agreed to abide by the outcome of any such review. The court's review is not limited, as petitioners suggest, to a determination of whether the individualized educational program developed for the child conforms with the state plan; the statute requires more.

Under 20 U.S.C. 1401(18),[4] the "free appropriate public education" to which a handicapped child such as Amy Rowley is entitled consists of special education and related services that meet each of four conditions, none of which is required to be addressed by the state plan. Compare 20 U.S.C. 1412(2) and 1413. Even if the "standards of the State educational agency" referred to in 20 U.S.C. 1401(18)(B) were set out in the state plan, and even if Amy Rowley's education met those standards, neither of which has been established on the record, the services provided to her would not be "appropriate" if they failed to satisfy any of the other requirements of 20 U.S.C. 1401(18). Compliance with the state plan by itself, therefore, is not a sufficient answer to a claim that a school district has failed to provide an appropriate education to a handicapped child. Although a particular state plan may not require school districts

[4] This section provides:

> The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

to provide sign-language interpreters for their deaf pupils (see Pet. Br. 42), the question remains whether such services are necessary for a particular pupil to satisfy the requirement of "an appropriate preschool, elementary, or secondary school education" (20 U.S.C. 1401(18)(C)) or the requirement that "special education" be "specially designed * * * to meet the unique needs of a handicapped child" (20 U.S.C. 1401(16)). This is precisely the question addressed by the district court, and that court did not err in failing to dismiss the complaint on the basis of petitioners' alleged compliance with the state plan.

The Secretary of Education's approval of New York's state plan under 20 U.S.C. 1413(c) does not establish that a "free appropriate public education" for a particular student need not include the provision of a sign-language interpreter in the classroom. Although the New York plan does not specifically *require* school districts to provide interpreters, neither does it *prohibit* them from doing so (see Pet. Br. 42). The plan simply does not address the question; it leaves to local school districts the initial decision regarding which services are appropriate to the needs of their deaf pupils. The Secretary's approval of the state plan therefore cannot properly be construed as sanctioning the refusal to provide a sign-language interpreter to Amy Rowley or to any other deaf pupil. Nor can the decision below properly be construed as invalidating the state plan.

II

THE DISTRICT COURT PROPERLY DETERMINED BY A PREPONDERANCE OF THE EVIDENCE THAT SIGN-LANGUAGE INTERPRETER SERVICES SHOULD BE INCLUDED IN THE "FREE APPROPRIATE PUBLIC EDUCATION" TO BE PROVIDED TO RESPONDENT AMY ROWLEY UNDER THE EDUCATION OF THE HANDICAPPED ACT

The standard adopted by the district court in determining what is a "free appropriate public education" is consistent with the language and legislative history of

the Education of the Handicapped Act and with applicable regulations, and was properly applied to the facts of this case.

Although the Act includes definitions of a "free appropriate public education" and other related terms, the statutory definitions do not adequately explain what is meant by "appropriate." See 20 U.S.C. 1401(18) ("free appropriate public education"); 20 U.S.C. 1401(16) ("special education"); 20 U.S.C. 1401(17) "(related services"); and 20 U.S.C. 1401(19) ("individualized education program").[5] Thus, courts called upon to review the content of an IEP, in accordance with 20 U.S.C. 1415 (e), inevitably are required to make a judgment, on the basis of the evidence presented, concerning whether the educational methods proposed by the local school district are "appropriate" for the handicapped child involved.

The district court in the present case recognized that for children like Amy Rowley, whose intellectual capacity is unimpaired, an "appropriate" education could mean an "adequate" education (*i.e.*, one that enables a handicapped student to progress from grade to grade and eventually earn a high school diploma) and that it could also mean an education that "enables the handicapped child to achieve his or her full potential" (Pet. App. C-11). The court concluded, however, that the proper standard is one that lies between these two extremes—one that requires that the handicapped child be given the same opportunity to achieve his or her full potential

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[5] 20 U.S.C. 1401(18) is set forth at note 4, *supra*. 20 U.S.C. 1401(16), (17) and (19) are set forth at Pet. App. I-6 to I-7. The difficulty is that the definition of the term "free appropriate public education" contains, *inter alia*, a requirement that such education "include an *appropriate* preschool, elementary, or secondary school education" (20 U.S.C. 1401(18)(C) (emphasis added)), with no further definition of the word "appropriate."

that is given to his or her non-handicapped peers.[6] The court explained (*ibid.*):

> Since some handicapped children will undoubtedly have the [intellectual] ability to do better than merely progress from grade to grade, this standard requires something more than the "adequate" education described above. On the other hand, since even the best public schools lack the resources to

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[6] In explaining this standard, the district court indicated (Pet. App. C-11 to C-12) that it would require the court to determine the extent to which the handicapped child's achievement falls short of his or her potential, and to compare that "shortfall" with the "shortfall" experienced by his or her non-handicapped peers. Petitioners (Br. 67-70) and Judge Mansfield (Pet. App. A-18) interpret this explanation as requiring that the potential and achievement of each non-handicapped child be evaluated and compared with those of each handicapped child. While we agree with petitioners that such a requirement would be unworkable, we do not believe the district court intended to impose such a requirement. Rather, the standard articulated by the court merely requires school districts to compare the educational opportunity offered to handicapped children with the educational opportunity offered to non-handicapped children. This allows for consideration of the deficiencies of a particular school system in evaluating what the school system must provide to its handicapped children. Thus, the issue to be determined in each case is neither relative potential of students nor relative educational achievement. Rather, the individual education plan must provide for substantially equal access to the educational process. For example, if a school system as a whole suffers from a relatively high student-teacher ratio, a determination that a handicapped child in that system could better achieve his or her maximum potential in a less crowded classroom would not of itself require the school system to provide a smaller classroom environment for that child, since all children in that school system are given equal access to the educational program in this respect.

Even if the district court interpreted its own standard as suggested by petitioners and Judge Mansfield, rejection of that interpretation would not require reversal of the court of appeals' decision. For the reasons set forth herein, the standard articulated by the district court—that the handicapped child be given the same opportunity to achieve his or her full potential that is given to his or her non-handicapped peers—is the proper standard under the Education of the Handicapped Act. The court's "shortfall" language is only a gloss on that standard, and may be rejected by this Court while accepting the standard itself.

> enable every child to achieve his full potential, the standard would not require them to go so far.

Accord, *Springdale School District No. 50* v. *Grace*, 656 F.2d 300, 304-305 (8th Cir. 1981); *Espino* v. *Besteiro*, 520 F. Supp. 905, 913 (S.D. Tex. 1981). See also Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 Harv. L. Rev. 1103, 1125-1127 (1979).[7] The district court's standard, properly read to require substantially equal access to the educational process, is correct.

The court of appeals correctly concluded that this view has stronger support in the language and legislative history of the Act than the alternative standards advanced by petitioners and by Judge Mansfield in his dissenting

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[7] This case is not like *Battle* v. *Pennsylvania*, 629 F.2d 269 (3d Cir. 1980), cert. denied *sub nom. Scanlon* v. *Battle*, No. 80-827 (June 22, 1981), because the court of appeals there found it unnecessary to evaluate the content of an IEP prepared for a particular handicapped student. The court in *Scanlon* reviewed, not an individual decision by a local school district with respect to a single student, but an across-the-board state policy limiting the number of days of instruction that could be provided to any student. Without addressing the specific needs of any individual handicapped child, the Third Circuit ruled that the state's inflexible policy was inconsistent with the Act's emphasis on tailoring each IEP to the "unique needs" of the affected handicapped child.

Scanlon is further distinguishable from the present case because the handicapped respondents in *Scanlon* all suffered from severe mental impairments or emotional disturbances and therefore could make only the most limited form of educational progress. Accordingly, whatever the merits of the district court's emphasis in *Scanlon* (see 80-827 Pet. App. 48a) on enabling handicapped students to achieve the maximum possible degree of self-sufficiency and independence from others, that decision is not inconsistent with the district court's conclusion in the present case that the Act seeks to provide handicapped students with an opportunity to fulfill their potential equivalent to the corresponding opportunity available to their non-handicapped classmates.

opinion below.[8] In contrast to their position, the statute speaks of the provision of a "*full* educational opportunity to all handicapped children." 20 U.S.C. 1412(2)(A)(i) (emphasis added); see also, *e.g.*, S. Rep. No. 94-168, 94th Cong., 1st Sess. 3 (1975); 121 Cong. Rec. 19482-19483 (1975) (remarks of Sen. Randolph); *id.* at 19505 (Sens. Humphrey and Beall); *id.* at 23703-23705 (Rep. Brademas); *id.* at 25538 (Rep. Cornell); *id.* at 37025 (Rep. Perkins); *id.* at 37410 (Sen. Randolph). Indeed, at times it was stated that the Act had the even more far-reaching goal of tailoring each handicapped child's educational plan to enable the child "to achieve his or her maximum potential." H.R. Rep. No. 94-332, 94th Cong., 1st Sess. 13, 19 (1975); see also 121 Cong. Rec. 23709 (1975) (remarks of Reps. Biaggi and Minish). Cf. *Kruelle* v. *Biggs*, 489 F. Supp. 169, 173 (D. Del. 1980), aff'd *sub nom. Kruelle* v. *New Castle County School District*, 642 F.2d 687 (3d Cir. 1981). Of course, as the district court recognized (Pet. App. C-11), Congress did not intend to require "the best possible education that a school could provide if given access to unlimited funds." Note, *supra*, 92 Harv. L. Rev. at 1125. But the Act does "guarantee that handicapped children are provided *equal* educational opportunity." S. Rep. No. 94-168, *supra*, at 9 (emphasis added); see also, *e.g.*, 121 Cong. Rec. 19504 (1975) (remarks of Sen. Humphrey); *id.* at 19505 (Sen. Beall); *id.* at 23704 (Rep. Brademas); *id.* at 25540 (Rep. Grassley); *id.* at 37031 (Rep. Mink); *id.* at 37412 (Sen. Taft); *id.* at 37413 (Sen. Williams); *id.* at 37418-37419 (Sen. Cranston); *id.* at 37419-37420 (Sen. Beall). And this

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[8] Petitioners argue (Br. 66) that the Act was intended merely to enable the handicapped to "become independent, self-sufficient members of society, insofar as their handicapping conditions allow." Judge Mansfield's view is set forth at Pet. App. A-19. See also pages 7-8, *supra*. These standards, although perhaps applicable in determining the appropriate educational program for children whose intellectual capacity is impaired by their handicap, are inconsistent with the legislative emphasis on equality of education (see pages 16-17, *infra*) as applied to children whose intellectual capacity is not so impaired.

means equal opportunity in practice, not just as a matter of theory unrelated to the needs of particular handicapped children. As Senator Stafford, a co-sponsor of the bill in the Senate, remarked, the education provided to handicapped children under the Education of the Handicapped Act "should be equivalent, at least, to the one those children who are not handicapped receive." 121 Cong. Rec. 19483 (1975); see also *id.* at 19494 (Sen. Javits); *id.* at 37030 (Rep. Mink).

In view of the legislative emphasis on equality of opportunity, the court of appeals properly concluded that Congress intended a student like Amy Rowley to be entitled to equal access to the existing educational environment and that, on the facts as found below, the provision of an interpreter was requisite to providing such access. One of Congress' objectives in enacting the statute was to ensure that the talents of handicapped children would not be squandered, but would be developed in the same way as those of their non-handicapped counterparts. This goal appears as applicable to gifted handicapped children as it does to those less intellectually able.

In seeking to determine the meaning of the phrase "free appropriate public education," as it is used in the Education of the Handicapped Act and as applied to Amy Rowley, the district court (Pet. App. C-9 to C-10) also looked to the regulations promulgated under a related statute, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. (Supp. III) 794.[9] These regulations also require the provision of a "free appropriate public education" to the handicapped,[10] defining an "appropriate" education as "regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons *as adequately as the*

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[9] HEW's regulations under Section 504, codified in 45 C.F.R. Part 84, have been reissued by the Department of Education and recodified in 34 C.F.R. Part 104.

[10] See 45 C.F.R. 84.33(a), recodified at 34 C.F.R. 104.33(a). The requirement applies to any recipient of federal funds that operates a public elementary or secondary education program.

needs of nonhandicapped persons are met." 45 C.F.R. 84.33(b)(1) (emphasis added), recodified at 34 C.F.R. 104.33(b)(1).[11]

There can be little doubt, given the district court's findings of fact,[12] that its conclusion regarding the adequacy of respondent Amy Rowley's IEP was justified. The court found that Amy is a bright, highly motivated, and energetic child with an IQ of 122, who nevertheless can identify less than 60% of what is said in the classroom.[13] The court further found that, using only her hearing aid and her lipreading ability, Amy "is not learning as much, or performing as well academically, as she would without her handicap" (Pet. App. C-8 to C-9). The court noted that, without an interpreter, much of Amy's energy

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[11] Petitioners do not challenge the district court's consultation of regulations issued under the Rehabilitation Act in the interpretation and application of the Education of the Handicapped Act. In any event, in seeking to determine the meaning of a phrase not fully defined in the Education of the Handicapped Act itself, the court could properly look to sources outside the Act for assistance. Although not dispositive, the interpretation of similar language in regulations promulgated under a related statute was one such source. Consultation of that source was appropriate since the regulations under the Education of the Handicapped Act that were in effect at the time of the district court's decision explicitly required that each annual state plan submitted to the Secretary of Education under 20 U.S.C. 1413 include an assurance that the program would be operated in accordance with the Secretary's Section 504 regulations. See 45 C.F.R. 121a.150 (1979). Current regulations require that state plans meet all statutory and regulatory requirements, and that all states and subgrantees comply with several specified nondiscrimination statutes and their implementing regulations, including Section 504 and 34 C.F.R. Part 104. See 45 C.F.R. 100b.201 and 100b.500, to be recodified at 34 C.F.R. 76.201 and 76.500. See 45 Fed. Reg. 77368 (1980).

[12] See pages 4-6, *supra*.

[13] Although petitioners point to testimony which they deem "convincing evidence that Amy understands all of what is transpiring in her class" (Br. 78), the court of appeals correctly ruled that the district court's factual findings were not clearly erroneous.

must go into compensating for her handicap, whereas the services of an interpreter would enable her to channel her energy into greater academic achievement.[14] The court determined (*id.* at C-14) that it would be "unfair and contrary to law to penalize [Amy] for her own efforts and those of her parents, by which she has remained slightly above the median of her class." Accord, *Espino* v. *Besteiro*, *supra*, 520 F. Supp. at 913. Primarily on the basis of its finding that Amy was not receiving equal access to the existing educational environment, the court concluded that Amy's IEP should include the services of a sign-language interpreter.[15]

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[14] Although Judge Mansfield in his dissenting opinion (Pet. App. A-12) pointed to evidence that, during Amy's two-week trial period with an interpreter in her kindergarten year, she tended to follow the teacher rather than the interpreter, the district court (*id.* at C-17) attributed this tendency both to inadequate coaching as to how to respond to the change in her normal classroom experience and to inadequate time to adjust to the change. The district court also noted (*ibid.*) that the interpreter's determination that his services were not needed was strictly limited to the kindergarten class, and did not rule out the need for interpretation in subsequent academic years.

[15] The district court did not, as petitioners suggest (Br. 18; see also Br. 76, 79-81), hold that "no evidence had been received to determine or compare Amy's shortfall from potential, and it was thus free to order provision of an interpreter for Amy because 'every deaf child hears better in class with an interpreter.'" Rather, the court determined, based on Amy's auditory speech discrimination test results, that she understands 41% less of what is said to her without the services of a sign-language interpreter than she does with an interpreter (Pet. App. C-7 to C-8). Based on this determination, the court concluded that Amy is not performing up to her potential because her handicap and the absence of an interpreter in the classroom deny her equal access to the education provided her non-handicapped classmates (*id.* at C-14 to C-15). The court noted that expert testimony regarding the use of total communication "lent support to the inferences drawn from the word discrimination test results" (*id.* at C-15). In these circumstances, petitioners err in contending (Br. 74-86) that the district court improperly based its decision on expert testimony regarding "the

Petitioners conceded in the court of appeals (see Pet. App. A-5 n.4) that the "special education" and "related services" required by the Education of the Handicapped Act, as defined in 20 U.S.C. 1401(16) and (17) and in regulations promulgated pursuant to the Act, encompass the services of a sign-language interpreter, where appropriate; they contended merely that an interpreter is not "appropriate" and therefore not required in Amy's case. On the other hand, Judge Mansfield suggested in his dissenting opinion that because no specific reference is made to the services of a sign-language interpreter under these provisions, no such services are available under the Act.[16] The term "related services," however, is defined in 20 U.S.C. 1401(17) as "such developmental, corrective, and other supportive services (including * * * audiology * * *) as may be required to assist a handicapped child to benefit from special education." While it is true that 45 C.F.R. 121a.13(b)(1) (to be recodified at 34 C.F.R. 300.13(b)(1), 45 Fed. Reg. 77368 (1980)), in listing related services included within the term "audiology," does not list interpreter services, the comment at-

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superiority of total communication as a tool of education" (Pet. App. C-15), rather than on Amy Rowley's "unique needs."

[16] Judge Mansfield indicated (Pet. App. A-16) that provisions in the Rehabilitation Act of 1973, 29 U.S.C. (& Supp. III) 701 *et seq.*, specifically referring to interpreter services demonstrate that "when Congress wished to provide such services it knew how to do so." See 29 U.S.C. (Supp. III) 774(d) and 777e, providing for grants for the purpose of establishing interpreter training programs and interpreter service programs, respectively. These provisions, however, were enacted following a congressional finding and declaration of a compelling need to provide special supportive services to facilitate the implementation of programs to assist handicapped individuals mandated under both the Education of the Handicapped Act and Section 504 of the Rehabilitation Act. See 29 U.S.C. (Supp. III) 876(a)(1). Congress accordingly directed the Secretary of Labor to establish programs to train personnel to work with and assist handicapped individuals, including the training of "interpreters for the deaf and aides in classrooms to assist in the education of the handicapped." 29 U.S.C. (Supp. III) 876(b).

tached to that regulation emphasizes that "[t]he list of related services is not exhaustive," and that other services are available "if they are required to assist a handicapped child to benefit from special education." In Amy's case, the district court properly determined that, because 41% of Amy's education is not accessible to her without the services of a sign-language interpreter, she is entitled to such services under the Act.[17]

Petitioners suggest (Br. 43-47) for the first time in this litigation that cost considerations may play a part in determining what constitutes an "appropriate" education for a handicapped child, and that the requirement that they provide interpreter services to Amy Rowley would impose an undue financial burden on them.[18] This issue is not properly before the Court. In any event, having accepted funds under the Education of the Handicapped Act, the state is obligated to provide appropriate services for its handicapped children, within the limitations set forth by the Act. The Education of the Handicapped Act is a funding statute whereby federal grants are made available specifically "to assist states in initiating, expanding and improving special education programs."[19] *Gladys J.* v. *Pearland Independent School Dis-*

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[17] Judge Mansfield pointed out in dissent (Pet. App. A-19) that some of Amy's classmates "probably hear substantially less than 100% [too,] due to inattention, daydreaming, and other causes," and the district court recognized that others understand less than 100% due to lack of intellectual potential (*id.* at C-14 to C-15). The district court, however, properly distinguished these causes from Amy's inability to hear or understand what goes on in the classroom, stating (*id.* at C-15) that "Amy's lack of understanding, by contrast, is inherent in her handicap and is precisely the kind of deficiency which the Act addresses."

[18] Petitioners did not make this argument in the courts below, but rather contended only that Amy Rowley does not need the services of an interpreter. They give no support from the record for the cost estimates included in their brief.

[19] Federal funds provided under the Act are intended to supplement state funds, not to cover the entire cost of educating the state's handicapped children. See 20 U.S.C. 1413(a)(9)(B). The

trict, 520 F. Supp. 869, 873 (S.D. Tex. 1981). Accord, *Espino* v. *Besteiro*, *supra*, 520 F. Supp. at 910. Thus, the Act is "both a source of funds and a source of obligations." *Gladys J.* v. *Pearland Independent School District*, *supra*, 520 F. Supp. at 873 (footnote omitted). States that are unwilling to take on the obligations imposed by the Act need not accept federal funds under the Act. Recipients of funds under the Act, however, are required, as a condition of receiving those funds,[20] to provide "a comprehensive range of services to accommodate a handicapped child's educational needs, regardless of financial and administrative burdens." *Kruelle* v. *New Castle County School District*, 642 F.2d 687, 695 (3d Cir. 1981) (footnote omitted). Accord, *Gladys J.* v. *Pearland Independent School District*, *supra*, 520 F. Supp. at 879. To the extent that a school system receiving funds under the Act has insufficient funds to finance all of its necessary services and programs, it must still provide its handicapped children with educational opportunities commensurate with the opportunities it provides to its non-handicapped children; the inadequacies of the school system "cannot be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child." *Mills* v. *Board of Education of the District of Columbia*, 348 F. Supp. 866, 876 (D.D.C. 1972).

Of course, implicit in the notion of an "appropriate" education is some rule of reason, under which enormous expense to obtain minimal results would not be required. For example, if Amy could understand 90% of what goes on in the classroom without the services of an interpreter, as opposed to 95% with such services, her

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legislative history of the Act makes clear that Congress intended the federal funds to pay for part but not all of the cost of educating every handicapped child, and that, as a condition of receiving assistance under the Act, states and school districts would have to bear the balance of the cost. See S. Rep. No. 94-168, *supra*, at 15, 22; H.R. Rep. No. 94-332, *supra*, at 23-24. See also 121 Cong. Rec. 23706 (1975) (remarks of Rep. Perkins).

[20] See pages 2-3, *supra*.

educational program might well be "appropriate" without such services. In the circumstances presented here, however, the accommodation required by the Act in Amy Rowley's case includes providing the services of a sign-language interpreter.[21]

III

THE DISTRICT COURT PROPERLY GRANTED INJUNCTIVE RELIEF EXTENDING BEYOND THE SCHOOL YEAR COVERED BY THE INDIVIDUALIZED EDUCATION PROGRAM FOR WHICH RESPONDENTS SOUGHT JUDICIAL REVIEW

Notwithstanding petitioners' contention to the contrary (Br. 87-98), the district court was empowered to grant injunctive relief extending beyond the academic year for which respondents sought judicial review. 20 U.S.C. 1415 (e)(2) provides in pertinent part (emphasis added):

> In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, *shall grant such relief as the court determines is appropriate.*

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[21] This case differs from *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), in which this Court held that Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. (Supp. III) 794, did not require the petitioner college to accommodate the respondent's hearing disability by substantially modifying its nursing program. While Section 504 forbids the exclusion of an "otherwise qualified handicapped individual" from such a program solely by reason of his or her handicap, that statute does not require a school receiving federal funds to provide services to a handicapped student who is precluded by his or her handicap from fully benefitting from the program. Under the Education of the Handicapped Act, however, an elementary school education program must be made available to all school age handicapped children in a recipient state. Although the Court in *Davis* ruled (442 U.S. at 411) that Section 504 did not impose an "affirmative action obligation" on the petitioner to provide services to the respondent under the circumstances of that case, the Education of the Handicapped Act does contemplate that affirmative steps will be taken to ensure that every handicapped child receives a "free appropriate public education."

The district court correctly ruled (Pet. App. D-2 to D-3) that respondents had exhausted their administrative remedies with respect to Amy's 1978-1979 individualized education program and that, because the deficiencies in the IEP were "capable of repetition, yet evading review," the court retained jurisdiction to grant relief, despite the expiration of that school year. See *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911); *Roe* v. *Wade*, 410 U.S. 113, 125 (1973); *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 546 (1976). The court did *not* hold, as petitioners assert (Br. 19, 90), that it had jurisdiction over Amy's IEP for the 1979-1980 academic year, even though that IEP had not yet been prepared and even though respondents' administrative remedies had not yet been exhausted for that year.[22] Rather, applying its broad remedial authority under Section 1415 (e)(2), the court ordered injunctive relief extending into the 1979-1980 school year on the ground that "Amy needs an interpreter just as much (if not more) in 1979-80 as she did in 1978-79" (Pet. App. D-3).

To hold that such relief is not "appropriate" under the circumstances presented here would render the *Southern Pacific* doctrine meaningless. Since the administrative and judicial processes together take well over nine months to complete, those processes will never be completed during the same academic year for which a chal-

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[22] After this suit was filed, but before the State Commissioner of Education was joined as a defendant, the petitioner school corporation and the respondents stipulated that the district court should review Amy's placement for the 1979-1980 school year (see Pet. App. D-7 n.1). However, following his joinder as a defendant, the petitioner Commissioner challenged the district court's jurisdiction to consider Amy's 1979-1980 IEP, and the court acknowledged (*ibid.*) that "the parties have no power to confer subject matter jurisdiction on the court by agreement." The court did not further address the question of its jurisdiction over Amy's 1979-1980 IEP, in view of its determination that its jurisdiction over the 1978-1979 IEP was sufficient to support the relief granted (*id.* at D-3).

lenged IEP has been prepared.[23] Therefore, unless courts have the power to grant injunctive relief extending beyond that year, a plaintiff would be able to obtain a judicial declaration that a feature of his previous IEP violated the Act, but he would be unable to correct the problem prospectively. The error could be repeated and could still evade any review that could result in meaningful relief for the handicapped student.

Moreover, although the district court did not address the question, it in fact did have jurisdiction over Amy's 1979-1980 IEP, despite the lack of exhaustion as to that program. Failure to exhaust administrative remedies under the Act does not bar suit "when resorting to state procedures clearly would be futile." *Armstrong* v. *Kline*, 476 F. Supp. 583, 602 (E.D. Pa. 1979), remanded on other grounds *sub nom. Battle* v. *Pennsylvania*, 629 F.2d 269 (3d Cir. 1980), cert. denied *sub nom. Scanlon* v. *Battle*, No. 80-827 (June 22, 1981). Accord, *Harris* v. *Campbell*, 472 F. Supp. 51, 54 (E.D. Va. 1979); *Loughran* v. *Flanders*, 470 F. Supp. 110, 112 (D. Conn. 1979).[24] Because the school district's refusal to provide for a sign-language interpreter as part of Amy's 1978-1979 IEP was sustained throughout the administrative review of that program, and because the school district continued to maintain in the district court that no interpreter serv-

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[23] Petitioners contend (Br. 96-97) that, but for several months of delay occasioned by the respondents, this case could have been heard by the district court in early 1979 rather than in August of that year. The district court's decision, however, was not rendered until five months after the case was heard, was subject to further review by the court of appeals, and is still awaiting this Court's review two years after it was rendered.

[24] The legislative history of the Act demonstrates that this result was contemplated by Congress. See 121 Cong. Rec. 37416 (1975) (remarks of Sen. Williams):

> [E]xhaustion of the administrative procedures established under [the Act] should not be required for any individual complainant filing a judicial action in cases where such exhaustion would be futile either as a legal or practical matter. * * *

ices would be necessary in the absence of academic failure by Amy (Pet. App. C-12), exhaustion of administrative remedies with respect to the 1979-1980 program would have been futile.[25] The district court therefore had jurisdiction over that IEP without the necessity of additional state procedures.[26]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[25] If injunctive relief extending beyond the school year were deemed not "appropriate" within the meaning of 20 U.S.C. 1415(e)(2), exhaustion would also be futile in that it would preclude consideration by the courts at a time when they could render meaningful relief.

[26] Petitioners also contend (Br. 99-105) that the court of appeals erred in limiting the precedential effect of its decision pursuant to Rule 0.23 of its local rules. While we agree that Rule 0.23 was inapplicable in this case because the court's decision was not unanimous and was not rendered from the bench or by summary order, this alleged error has no effect on the substantive merits of the court's decision and accordingly does not constitute grounds for reversal. We believe the court's limitation of its decision was intended merely to preclude citation of its decision that Amy Rowley is entitled to a sign-language interpreter as authority for the proposition that all deaf children are entitled to such services. This limitation, like the court's decision, was entirely proper.

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